federal register

Wednesday
August 29, 1979

Part III

Environmental Protection Agency

Hazardous Substances; Determination of Reportable Quantities; Designation; Memorandum of Understanding Between EPA and Coast Guard on Assessment of Civil Penalties for Discharges of Oil and Designated Hazardous Substances; Proposed Removal of Lime from List and Proposed Application Requirements for NPDES Permits

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 117

[FRL 1305-2]

Water Programs; Determination of Reportable Quantities for Hazardous Substances

AGENCY: Environmental Protection Agency.

ACTION: Final rulemaking.

SUMMARY: This regulation establishes reportable quantities for substances designated as hazardous under section 311(b)(2)(A) of the Clean Water Act and sets forth requirements for notification in the event of such discharges. This regulation should be read in conjunction with 40 CFR Part 116: Designation of Hazardous Substances, as well as "Memorandum of Understanding Between the Environmental Protection Agency and the United States Coast Guard Concerning the Assessment of Civil Penalties for Discharges of Oil and Designated Hazardous Substances Under Section 311 of the Clean Water Act"; Proposed Regulations to Delete Lime from the List of 299 Hazardous Substances; and Request for additional Comments on Proposed Application Requirements for National Pollutant Discharge Elimination System (NPDES) Permits and on Proposed Rules for Regulating Indicator Parameters, which are being published in this **Federal Register** issue, and which directly relate to the implementation of these regulations.

EFFECTIVE DATES: These regulations will be effective September 28, 1979, except for discharges of hazardous substances which have been offered to common carriers who are required to accept such substances for shipment in compliance with applicable tariffs. EPA will publish notice in the **Federal Register** announcing the effective date of these regulations to such discharges.

FOR FURTHER INFORMATION CONTACT: Kenneth M. Mackenthun, Director, Criteria and Standards Division (WH-585), Office of Water Planning and Standards, EPA, 401 M Street SW., Washington, D.C. 20460, (202) 755-0100.

SUPPLEMENTARY INFORMATION:

Background

On March 13, 1978, the Environmental Protection Agency ("EPA") issued regulations under section 311 of the Clean Water Act ("CWA" or "the Act") to control the discharge of hazardous substances. (43 FR 10474). Part 116 in Title 40 designated 271 substances as hazardous; Part 117 determined the removability of each of these substances; Part 118 determined the harmful quantity for each substance; and Part 119 set forth the Agency's determination of units of measurement and rates of penalty for each hazardous substance. On the same day, EPA proposed regulations designating an additional 28 substances as hazardous.

Prior to their effective date, the regulations were challenged in several law suits. One such suit resulted in an Order declaring EPA's determinations of removability (Part 117) and harmful quantities (Part 118) invalid and resulted indirectly in the invalidation of the determinations of units of measurement and rates of penalty (Part 119). The designation of hazardous substances (Part 116) was not affected by the Court's action. See *Manufacturing Chemists Association, et al.* v. *Costle, et al.*, 455 F. Supp. 968 (W. D. La., 1978).

On November 2, 1978, section 311 of the Clean Water Act was amended by Pub. L. 95-576. The amended statute no longer requires the Agency to make determinations of removability or units of measurement for computing penalties. Therefore, Parts 117 and 119 of the March 13, 1978 regulations were revoked on February 16, 1979 (44 FR 10269). The basis for determining reportable quantities, formerly termed "harmful quantities", was simplified by the recent amendment and, therefore, Part 118 of the March 13, 1978 regulations was also revoked and reportable quantities were reproposed as a new Part 117 on February 16, 1979 (44 FR 10271). At the same time, the designation of 28 additional substances as hazardous was promulgated (44 FR 10266).

These regulations are authorized by section 311(b)(4) of the amended Act, which requires the Administrator to determine by regulation those quantities of "any hazardous substances the discharge of which may be harmful to the public health or welfare of the United States, including but not limited to shellfish, wildlife, and public and private property, shorelines, and beaches."

The Part 117 regulations promulgated today consist primarily of the following four changes from the regulations proposed on February 16, 1979: (1) The reportable quantity of one substance, calcium hypochlorite, has been changed; (2) The regulations no longer require the addition of fractions of reportable quantities in determining whether the discharge of a mixture or solution must be reported. (3) The applicability of the regulations to facilities permitted under the National Pollutant Discharge Elimination System (NPDES) has been clarified further, and (4) An exclusion from these regulations has been established for activities permitted under the section 404 (Dredge and Fill) of the Clean Water Act. Each of these changes is explained in detail in the appropriate section of the preamble which follows.

Relationship to Other Hazardous Pollutant Control Programs

The promulgation of these regulations governing the discharge of substances designated as hazardous under section 311 of the CWA, is a major step in the Agency's strategy to regulate the discharge to the Nation's waters of toxic and hazardous substances. The statute requires notification where discharges of hazardous substances occur in "reportable quantities", provides for civil penalties for such discharges, and imposes liability on dischargers for the costs of government clean-up. The 1978 amendments to the Act (Pub. L. 95-576) excluded from section 311 jurisdiction certain discharges from point sources permitted under section 402. It should be emphasized that discharges excluded from these regulations will be subject to stringent control under other regulatory authority. This section discusses current and contemplated regulations under separate authority which address discharges not subject to these section 311 regulations.

(A) Regulation Under Section 402 of the Act. On June 7, 1979, EPA published regulations governing the National Pollutant Discharge Elimination System (NPDES) program under section 402 of the Act (44 FR 32854). On June 14, 1979, EPA proposed consolidated permit regulations, including draft NPDES permit application requirements and forms (44 FR 34416). As explained elsewhere in this **Federal Register**, the Agency intends to broaden those application requirements to ensure proper control of hazardous substances through the NPDES program. The Agency is soliciting comments on this expanded approach.

Basically, control of hazardous substances under section 402 would be similar to that of toxic pollutants under section 307 and 402 of the Act. Certain permittees would be required to sample, analyze for, and report discharges of hazardous substances in their process wastewater. In many cases, estimates would be acceptable in lieu of analysis. Although most section 311 hazardous substances will not be regulated by effluent limitations guidelines issued under sections 301 and 304 of the Act, such substances may be regulated in an NPDES permit on a case-by-case basis. Regulation may be through the use of "indicator" parameters (44 FR 34397-99), or application-based limitations (44 FR

34404–07). Variability in discharges caused by upsets and bypasses are subject to 40 CFR 122.14 (k) and (l).

Discharges covered by section 402 rather than by section 311 are subject to reporting requirements, civil penalty liability, and liability for clean-up cost, which are similar to those found in section 311. NPDES regulations require reporting of discharges of section 311 substances in violation of permit conditions (40 CFR 122.14(i)). Discharges of hazardous substances which violate permit conditions are subject to a civil penalty of up to $10,000 per day (Section 309(d) of the Act). Permittees are liable for any clean-up costs resulting from certain discharges of hazardous substances from their facility (Sections 311(b)(6)(D), 309(b), and 504(b)). In short, discharges of hazardous substances from permitted sources will be subject to stringent control.

(B) Requirements for pollution prevention pursuant to 311(j)(1)(C). Section 311(j)(1)(C) of the Act requires promulgation of regulations to prevent the discharges of oil and hazardous substances from vessels and onshore and offshore facilities. Regulations have been promulgated by EPA to prevent oil spills from non-transportation related facilities (40 CFR Part 112) and by the Coast Guard to prevent oil spills from some transportation related facilities (33 CFR Part 154). The EPA regulation requires subject facilities to prepare and implement spill prevention control and countermeasure (SPCC) plans to prevent spills to navigable waters.

Similar regulations for prevention of hazardous substance spills from non-transportation related facilities are now being developed by EPA. When promulgated, these regulations will apply to any non-transportation related facility which, due to its location, could reasonably be expected to discharge a hazardous substance in violation of section 311(b)(3). Permitted facilities will be required to comply with pollution prevention regulations issued under the authority of section 311(j)(1)(C).

(C) Regulation under Section 404. Discharges of hazardous substances in compliance with "dredge and fill" permits issued under section 404 of the Act are exempt from coverage under section 311. The Agency will soon publish substantive guidelines governing issuance of section 404 permits. Permits will not be issued where the dredge and fill activity will have an unreasonable adverse impact on the waters of the United States. Where hazardous substances are likely to be present in dredged material, testing may be required. Thus, section 404 permits will be granted only where evidence indicates that hazardous substances will not result in unreasonable harm.

Method for Determining Reportable Quantities

The method for determining reportable quantities is the same as that used in determining harmful quantities in the March 13, 1978 regulations. Basically, designated hazardous substances are classified by relative acute toxicity to aquatic organisms into one of five categories with assigned reportable quantities of one, ten, one hundred, one thousand or five thousand pounds. (For a more detailed discussion of that methodology, see 43 FR 10489–92 and 40 FR 59982–89.)

Toxicological data for individual substances used in determining reportable quantities were derived from the compendium of information fact sheets entitled, *Hazardous Substances Facts Sheets, 1977,* which are available from the Environmental Protection Agency. In addition, other primary sources of data were: "Water Quality Criteria", Federal Water Pollution Control Administration, 1968, "Water Quality Criteria", EPA, March 1973, and "Quality Criteria for Water", EPA 440/9–76–023, July 1976.

The Agency is aware that the quantities promulgated today are the same as those which a federal district court concluded were "arbitrary and capricious and contrary to the statutory mandate" (455 F. Supp. 965, 978). However, Congress subsequently changed the applicable statutory mandate (Pub. L. 95–576). In so doing, Congress made it clear that it expected EPA to "promulgate the same 271 designations and quantities without change as soon as possible" (Congressional Record of October 14, 1978 (S19259)). Thus, the reportable quantities promulgated today are consistent with the amended statutory mandate.

EPA has changed the applicability of these regulations to discharges of mixtures and solutions. As proposed, the regulations applied in some circumstances to discharges of mixtures or solutions, where less than a reportable quantity of a given hazardous substance was discharged. For example, a discharge of a mixture containing 70% of a reportable quantity of substance A and 60% of a reportable quantity of substance B, would have been subject to the proposed rules. The Agency has re-evaluated its assumption that the toxic properties of different substances can be considered additive and concluded that the assumption is not valid for all combinations of designated hazardous substances. Based on this review, as well as on the unnecessarily difficult calculations and reporting requirements, the regulations have been revised. Discharges of mixtures and solutions are subject to these regulations only where a component hazardous substance of the mixture or solution is discharged in a quantity equal to or greater than its reportable quantity.

In the proposed February 16, 1979 regulations, calcium hypochlorite was assigned to toxicity Category A as it was in the original March 13, 1978 regulations. However, after those regulations were published, further information was submitted to the EPA indicating that it actually belonged in toxicity Category B. This correction was noted in the **Federal Register** of June 26, 1978 (43 FR 27534) but was not carried over to the proposed regulations. Therefore, there regulations have been changed to reflect the original correction.

Applicability

These regulations apply to quantities of designated substances equal to or greater than reportable quantities, when discharged into or upon the navigable waters of the United States, adjoining shorelines, into or upon the contiguous zone, or beyond the contiguous zone as provided in section 311(b)(3) of the Act. This section of the preamble explains in greater detail when a discharge from a NPDES permitted facility is excluded from section 311 coverage. These exclusions are discussed in greater detail under the heading "Applicability to Discharges from Facilities with NPDES Permits".

In addition, a determination has been made regarding applicability to discharges associated with dredging and filling activities (applicability was reserved in the regulations proposed on February 16, 1979). Such discharges will now be excluded as long as a valid permit issued under section 404 of the Clean Water Act has been obtained. More information is provided below in "Applicability to Discharges Associated with Dredging and Filling Activities".

In the proposed regulations, the Agency discussed in some detail the issues relating to the applicability of section 311 to Publicly Owned Treatment Works (POTWs) and discharges which may enter navigable waters after passing through a sewer system. Numerous comments were received on this issue in the proposed regulations and are discussed in more detail below under the heading "Applicability to Discharges from Publicly Owned Treatment Works and Their Users".

The Administrator of the Environmental Protection Agency may allow the discharge of a substance, above the reportable quantity, on a case by case basis. The Administrator will allow such a discharge only after significant evidence has been provided to the Administrator to show that the discharge will occur in connection with research or demonstration projects relating to the prevention, removal, control or abatement of hazardous substances, and that the results of the study will outweigh the environmental hazard created as a result of the discharge (as provided for in section 104(i) of the Clean Water Act).

Applicability to Discharges From Facilities With National Pollutant Discharge Elimination System (NPDES) Permits

The rules proposed on February 16, 1979, added a section concerning the applicability of these regulations to discharges of hazardous substances from point sources with NPDES permits issued under section 402 of the Act. The preamble to those regulations discussed the applicable legislative history of section 311, including the effects of the 1978 amendments to the Act (Pub. L. 95–576). (44 FR 10272–74). Those amendments excluded: (1) Discharges in compliance with a permit under section 402 of the Act, (2) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of the Act, and subject to a condition in such permit, and (3) continuous or anticipated intermittent discharges from a point source, identified in a permit or a permit application under section 402 of the Act, which are caused by events occurring within the scope of relevant operating or treatment systems.

Basically, the amendments provide that discharges from permitted point sources which are associated with manufacturing and treatment will be regulated under sections 402 and 309. Spill situations will be subject to section 311, regardless of whether they occur at a facility with a 402 permit.

(A) Summary of Exclusions from Section 311. In the proposed regulations, the first exclusion was applied to discharges of a hazardous substance which did not exceed an effluent limitation specifically applicable to such substance. The second exclusion was available where a permit application identified the source and amounts of the substance to be discharged, as well as the treatment or containment to be provided, and where the discharge was subject to a condition in a permit. The third exclusion applied to chronic, process related discharges resulting from periodic upsets in the manufacturing and treatment systems. These chronic, process-related discharges were excluded in the proposed regulations until the next permit revision when the permittee had the opportunity to become eligible for the first or second exclusion.

In response to comments and after a re-evaluation of the legislative history and the statute, the Agency has revised the regulations implementing these exclusions. The Agency generally agrees with those commenters who stated that the proposed rules had interpreted the three exclusions too narrowly and in a manner inconsistent with Congressional intent. As proposed, the regulations would have covered under section 311, some discharges occurring within the scope of manufacturing and treatment processes, discharges which are better regulated under sections 402 and 309. The regulations promulgated today are consistent with Congress' intent and ensure that discharges excluded from section 311 are controlled under other authority.

The first exclusion will apply to discharges in compliance with a permit limitation specifically applicable to the hazardous substance, including any limitation designated by the permitting authority as an indicator of that substance and any application-based limitation. (*See* 44 FR 34397 and proposed 40 CFR 122.68(a)(2), 44 FR 34415). The second exclusion applies to discharges from a point source: *Provided,* That the substance, amount, source, and treatment system are identified in the public record, and the substance to be discharged is subject to a permit condition requiring treatment of the discharge. The third exclusion applies to chronic and anticipated intermittent discharges from a point source identified in a permit or permit application. The third exclusion will remain applicable after permit reissuance or revision.

Discharges which are not subject to a limitation and which are not covered by the second or third exclusion will be subject to the notification, civil penalty, and removal cost provisions of section 311. Each of the exclusions is explained in greater detail below.

(B) Exclusion 1. In some cases, permit effluent limitations representing an appropriate waste treatment technology level exceed the section 311 reportable quantity for a hazardous substance. Thus, a permittee may be in compliance with his permit while discharging a hazardous substance in amounts greater than the reportable quantity. Under these regulations, if a discharge is in compliance with a permit issued under section 402, such discharge is excluded from section 311. This exclusion applies when the permit contains either a limitation specifically applicable to the hazardous substance or a limitation designated by the permitting authority as an indicator parameter for such a substance.

The scope of this exclusion as proposed has been expanded to cover limitations which may not specifically limit hazardous substances, but which are designed to act as control parameters for such substances. For instance, the Agency may, in some circumstances, control discharges of some hazardous substances by placing limits upon traditional pollutant parameters, such as BOD or COD. (Such parameters may be referred to as "indicator" pollutant parameters. See the discussion accompanying proposed NPDES application requirements, 44 FR 34396–99, June 14, 1979, and preamble to the proposed effluent limitations guidelines for leather tanning, 44 FR 38746, 38757–38758, July 2, 1979.) Where effluent guidelines, a permit, or fact sheets prepared in conjunction with permits identify hazardous substances as being controlled by "indicator" limitations, such limitations would be considered permit limitations for purposes of these regulations, and discharges complying with such limits would be excluded from section 311. Similarly, in cases where specific technology based effluent limits are not applicable, permits may contain effluent limitations based on discharge amounts (or some multiple of these amounts) reported in permit applications. (*See,* Proposed 40 CFR 122.68(a) 44 FR 34415, 34404–07 (June 14, 1979).) Such limits (known as application-based limits) would also be considered permit limitations for purposes of these regulations, and discharges from point sources complying with such limits would be excluded from section 311.

(C) Exclusion 2. Some discharges of hazardous substances from permitted point sources may result from circumstances which were identified and considered in the issuance of a permit, but are not subject to any specific effluent limitations. The second exclusion addresses these situations, and applies where the source, nature, and amount of a potential discharge was identified and made a part of the public record, and a treatment system demonstrated as capable of preventing that potential discharge was made a permit requirement.

The "public record" has been defined to include the permit application and any supplemental documents contained in the "record for final permit" as defined in 40 CFR 124.122. The public record must identify the substance to be excluded, as well as the amount and origin or source of the substance.

The second exclusion exempts discharges "resulting from circumstances identified, reviewed and made a part of the public record (of a permit) . . . and subject to a condition in [a] permit." On its face, this exclusion applies to a broad range of discharges, including those resulting from on-site spills to the treatment system as well as to chronic process discharges originating in the operating or treatment systems, provided they are subject to a specific permit condition. However, due to overlap between the 2nd and 3rd exclusion, certain continuous and anticipated intermittent discharges are exempted by the 3rd exclusion, regardless of the existence of an applicable permit condition. Thus, the second exclusion will, as a practical matter, cover principally those discharges resulting from onsite spills to the permitted treatment system.

The legislative history makes it clear that Congress intended discharges caused by on-site spills to be excluded from section 311 (and subject to section 402) only where it could be demonstrated that such on-site spills had been contemplated and had been processed through a treatment system which should have been capable of preventing a reportable discharge. (*See* Congressional Record of October 14, 1978 (S19259 and H13599)). Thus, the "condition" contemplated in 311(a)(2)(B) will be placed in permits to exclude discharges caused by spills only where the permittee demonstrates that the treatment system is in fact sufficient to treat the potential spill identified. For example, if a discharger has a drainage system which will route spilled material from a broken hose connection to a holding tank or basin for subsequent treatment and discharge at a specified rate, documentation must be submitted with the application. The proposed permit condition must be sufficient to treat the maximum potential spill from the identified source. This exclusion will not exempt a discharge which results from an on-site spill larger or more concentrated than the spill contemplated in the public record.

(D) Exclusion 3. Exclusion 3 applies to all continuous or anticipated intermittent discharges originating in the manufacturing or treatment systems, including chronic discharges and those caused by upsets and treatment system failures. The exclusion is not dependent on the scope of the permit, so long as a permit application has been submitted, or a permit exists, covering the point source in question. Discharges caused by spills or episodic events which release hazardous substances to the manufacturing or treatment systems are not covered by this exclusion.

The Agency intends to require additional information under section 402 concerning those discharges subject to the third exclusion. Such information is not required under section 311 and is not a requisite for exclusion from section 311. However, the Agency does intend to require such information in the NPDES application forms. Elsewhere in this **Federal Register**, additional information is published concerning EPA's proposed requirements.

Applicability to Discharges From Publicly Owned Treatment Works and Their Users

The February 16, 1979, proposal of 40 CFR Part 117 sought public comment on several options described in the preamble for clarifying jurisdiction among sections 307 (b) and (c) and section 311 for chronic discharges and spills from industrial sources which reach navigable waters through publicly owned treatment works (POTWs). The Agency received a number of thoughtful comments. Due to the complexity of the issues, the diversity of issues raised in public comments, and the potential impact of any decision on the thousands of facilities which regularly discharge hazardous substances to POTWs, EPA is reserving regulation of such discharges from industrial facilities to POTWs at this time.

Another principal question addressed in EPA's February 16 proposal, involved the role and responsibility of the POTW when a hazardous substance is introduced to its treatment system and then discharged into navigable waters. The Agency believes that the 1978 amendment excluding from section 311 certain discharges by sources with NPDES permits applies to some discharges of hazardous substances a permitted POTW may make to navigable waters. In particular, the exclusions may be appropriate for chronic or anticipated intermittent discharges of hazardous substances such as chlorine, which are used by the POTW in the operation of its treatment system. Of course, classic spills by the POTW of hazardous substances it may use or store on its premises are subject to section 311, unless a condition in the permit providing for treatment of the spilled substance qualifies the discharge for exclusion two.

The problem is in determining the applicability of the exclusion provisions and defining the role and responsibility of a POTW when it discharges hazardous substances as a result of influent received from an indirect discharger. Application of Congress' intent is less clear in this case.

The three exclusions for discharges from permitted sources presuppose that the permitted source knows of the presence of the hazardous substance and has made or will make provisions to treat the particular substance prior to discharge. However, unless notified that a hazardous substance has been introduced to its system, a POTW may not be aware of the presence of the substance.

For this reason, § 117.12(a)(4) of the proposed regulations excluded from section 311 "discharges from a POTW of substances received as influent at the treatment works". EPA agrees with commenters who stressed that it is unreasonable to hold the POTW liable for discharges from users, or under circumstances which it is unaware of, or unable to control. Therefore, POTWs will not be held responsible for discharges of hazardous substances received as influent. EPA also recognizes the merits of State comments stressing that, nevertheless, discharges to navigable waters resulting from influent received at the POTW should not, as proposed in paragraph (a)(4), be totally excluded from section 311. Therefore, the promulgated regulations have been revised to delete paragraph (a)(4).

Applicability of these regulations to discharges of hazardous substances received as influent by a POTW is reserved in § 117.13(a) and therefore, POTWs will not be subject to 311 civil penalties or liabilities for government costs of clean-up of such discharges. However, POTW's are encouraged to report any known discharges of hazardous substances in excess of reportable quantities so that the provisions and funds of section 311(k) may be used to clean-up and mitigate the effects of these discharges to navigable waters. Of course, the Agency believes that hazardous substances which are used by the POTW in the operation of its treatment system and which are discharged to navigable waters in reportable quantities are subject to the provisions of section 311 unless the discharge has been exempted under one of the three exclusions of the 1978 amendments to section 311.

In some cases a POTW may become aware that a spill to its system has

occurred. This could occur when the POTW is notified by the source of the spill or where it becomes aware of an incident, as through news broadcasts. The Agency believes that if the POTW knows that a spill has occurred, it should make the fastest and, under the circumstances, best assessment that it can concerning the most effective action to take. The goals should be twofold. First, to protect itself from serious damage or upset, and second, to mitigate the damage to the environment to the maximum extent possible. Measures a POTW might take could include partial or complete treatment of the hazardous substance, or a diversion or bypass of flows containing the substance and notification of downstream users where only such action would prevent even more significant environmental damage.

Further, EPA encourages POTWs to immediately notify the Coast Guard when a reportable quantity of a hazardous substance has been discharged, or will be discharged, to navigable waters so that appropriate mitigation can begin at once and downstream users of the water can be warned. If, on the other hand, the POTW is certain it can prevent such a discharge, the Agency encourages the POTW to report to the Coast Guard that a spill to the POTW's system has occurred, but that it will be contained or treated by the POTW's treatment system.

Applicability to Unauthorized Mobile Source Discharges Through POTWs

There is one case where today's promulgated regulations apply to discharges of designated hazardous substances to navigable waters through POTWs. Discharges will be subject to section 311 where a discharge of a reportable quantity of a designated hazardous substance is made to a sewer system from a truck, train, or other mobile source which has not contracted or otherwise received written permission to discharge the designated substance into the POTW. For example, a waste hauler who contracts to discharge specific hazardous substances to the sewer would not be required to report under section 311 of these regulations. However, an illegal discharge, or "midnight dump", as well as any accidental discharge by a mobile source into a POTW's sewer system, would be reportable and subject to all applicable provisions of these regulations.

The Agency believes such a rule is necessary because unexpected discharges from mobile sources to navigable waters through sewer systems present problems which are significant and distinct from discharges to sewer systems from industrial facilities. As several commenters noted, mobile sources which have made no advance arrangements with public authorities for such discharges of hazardous substances are not subject to NPDES permits, industry specific effluent limitations or pretreatment standards. Neither can the treatment works be designed or operated by the POTW so as to assure that the discharge of unanticipated hazardous substances by a mobile source will not reach navigable waters. As several commenters stressed, POTWs may not even know of the presence of a hazardous substance unless notified by the mobile source creating the discharge.

The problems brought about by unexpected discharges to POTWs by mobile sources were exemplified in March of 1977 when an unknown hazardous substance entered Louisville, Kentucky's Morris Foreman Sewage Treatment Plant. Toxic fumes from the mystery substance sickened 32 employees of the plant and forced a complete shutdown of the facility. Subsequent investigations determined that the substance, a mixture of two rare and highly toxic industrial chemicals (octa and hexachlorocyclopentadiene) had been illicitly dumped into the city sewer system from an industrial waste hauler's tank truck. In addition to endangering downstream water supplies, the effects of this "midnight dump" on the POTW were devastating. For three months the plant discharged 105 million gallons per day of untreated sewage to the Ohio River while the facility was decontaminated. Clean-up of the approximately three miles of sewer which had carried the chemicals continues today, almost two and one-half years after the incident occurred. Clean-up and disposal of residues containing the chemicals have cost millions of dollars.

Commenters pointed out additional problems unique to unexpected discharge by mobile sources. In some instances POTWs lack any authority to control such discharges, as where State-enabling legislation provides for control to be exercised through a contract or permit to use the sewer system. Even where POTWs have sufficient authority in enabling statutes, they often lack a means of implementing and enforcing such authority for unexpected discharges from mobile sources, whereas they generally do have such capability for enforcing sewer use ordinances and pretreatment standards for fixed facilities. Out-of-town carriers of intra- and interstate commerce, unlike fixed facilities, may not be aware of the existence of local requirements for notification, pretreatment, or clean-up in the event of a spill to the sewers. Although unauthorized discharges to sewers from fixed facilities can also occur, means are available to minimize such occurrences. In contrast, spills involving mobile sources are more difficult to anticipate in advance and prevent.

Since EPA lacks authority under section 311 to require mobile sources who spill to POTWs to notify the POTW, these regulations require only that the Coast Guard be notified. Mobile sources which spill hazardous substances to a sewer are, of course, strongly urged to report the discharge to the POTW at the same time they report it to the Coast Guard so that the POTW can protect its sewer system and take any available mitigating actions.

Applicability to Discharges Associated with Dredging and Filling Activities

Comments were received on how designated hazardous substances are to be controlled when present in discharges of dredged or fill materials, and on the relationship in this regard of section 311 requirements and section 404 requirements. Commenters generally supported the concept of using the section 404 permit process to ensure compliance with section 311 requirements, providing there is a means for determining whether discharges of dredged or fill material contain hazardous substances and providing that a level of testing is required that would preclude the discharge of dredged or fill material containing designated hazardous substances in quantities that violate the spirit and intent of section 311.

On September 5, 1975, EPA published interim final guidelines establishing the substantive criteria for permit decisions for the discharge of dredged or fill material under section 404 (40 CFR Part 230). Experience in the implementation of these guidelines and the results of ongoing research both have indicated the need to revise and clarify the 1975 guidelines. Such revisions have been prepared in draft and the Agency expects to propose revised section 404(b)(1) guidelines in the near future. The Agency's position is that the section 404(b)(1) guidelines will protect the environment from designated hazardous substances when such are contained in discharges of dredged or fill material.

The Agency believes that discharges of dredged or fill material should not be permitted if the discharge will have an unacceptable adverse impact on the

waters of the United States. The Agency recognizes the difficulty in measuring the exact amount of particular hazardous substances in dredged or fill material. Moreover, the amount of a hazardous substance contained in dredged or fill material which actually may be harmful may be vastly different from a similar amount of hazardous substance that is spilled or discharged directly into water. The section 404(b)(1) guidelines will ensure that the impact of any discharge of dredged or fill material will be fully understood before a decision is made to permit such discharge. The permitting authority will be required to make a determination of the potential for adverse effects on aquatic and wetland organisms and ecosystems, including bioaccumulation, as a result of the availability of any pollutant (including designated hazardous substances) in the solid, liquid, or suspended particulate phase of the discharged material.

In assessing the potential for adverse effect, the permitting authority must consider the likelihood that the dredged or fill material proposed to be discharged is a carrier of pollutants. If this determination indicates that pollutants, such as section 311 designated hazardous substances, are likely to be present, then the permitting authority is required to undertake tests to determine the effect of the proposed discharge on the receiving environment at the proposed disposal site. Depending upon the circumstances, testing required in the guidelines may include chemical analyses of liquids or solids, bioassays, bioaccumulation tests, or biologic ecosystem evaluations. The guidelines will state explicitly that a circumstance to be considered in assessing the needs for testing of dredged or fill material is a history of spills of substances designated as hazardous under section 311.

The Agency believes that adequate protection from section 311 designated hazardous substances will be provided through the section 404(b)(1) guidelines. Because of their requirement for implicit consideration of the potential impact of such substances when they are contained within dredged or fill material proposed to be discharged, these regulations will not deal with the discharge of dredged or fill materials. Such activities will be controlled through the section 404 EPA guidelines.

Procedure for Giving Notice of Discharge

Procedures for giving notice of discharges above the reportable quantities are explained in 33 CFR 153.203, "Procedure for the Notice of Discharge". A copy of that regulation appears as Attachment I to this preamble.

Penalties

The proposed section 311 regulations provide two methods for penalizing dischargers of hazardous substances. The first, which already existed as section 311(b)(6) of the statute prior to the amendment of November 2, 1978, provides for the assessment by the United States Coast Guard of a civil penalty not to exceed $5,000 for the discharge of oil or a designated hazardous substance (section 311(b)(6)(A)). The second option, created by the new amendment, provides that the EPA, through the Department of Justice, may initiate a civil action in Federal district court for penalties not to exceed $50,000 per discharge unless such discharge is the result of willful negligence or willful misconduct, in which case the penalty shall not exceed $250,000 (section 311(b)(6)(B)). The final regulations show no change from those proposed on February 16, 1979.

Factors to be considered by EPA in determining whether a higher penalty is warranted are described in these regulations. Prompt mitigation of a discharge is encouraged by making mitigation an important consideration in establishing the size of the penalty. This is particularly significant in discharges of hazardous substances which are capable of actual removal. A discharger of a designated hazardous substance can be penalized under section 311(b)(6)(A) or section 311(b)(6)(B), but not both. The EPA and the United States Coast Guard have developed an agreement regarding those cases which shall be referred to EPA for consideration of the higher penalty. This Memorandum of Understanding is published in this **Federal Register.** In those cases where EPA determines to bring action for a civil penalty, administrative penalty assessment under section 311(b)(6)(A), which would otherwise be initiated by the United States Coast Guard, will be withheld.

Civil penalties will not be assessed under both section 311 and 309 for the same discharge. The Memorandum of Understanding between the Coast Guard and EPA sets forth procedures for determining when a discharge of a hazardous substance is subject to section 311 (and thus section 311(b)(6) penalties) and when such a discharge is excluded from section 311 and subject to section 402 (and thus section 309 penalties). The two agencies are developing a similar Memorandum of Understanding which will provide procedures for determining when a discharge of oil is subject to section 311 (and thus section 311(b)(6) penalties), and when a discharge of oil is excluded from section 311, and subject to section 402 (and thus penalties assessed under section 309). The latter Memorandum of Understanding will be published together with modifications of current regulations addressing oil discharges under section 311.

It should also be noted that any costs of removal incurred in connection with a discharge excluded by section 311 (a)(2)(C) (40 CFR 117.12(a)(3)) will be recoverable from the owner, operator or person in charge of the source of the discharge in an action brought under section 309(b) of the Clean Water Act.

Economic Impact Statement

These regulations are intended to encourage a high standard of care in handling hazardous substances by requiring the reporting and clean-up of discharges of such substances in reportable quantities. These regulations do not require the construction or purchase of equipment to treat or prevent discharges. They do not require spill prevention measures, nor do they prohibit the manufacture, use or transport of any substance. Where such measures are required by regulation, any associated economic impacts must be analyzed in connection with those regulations.

The intent of these regulations is not to establish a permit program for the discharge of spills of hazardous substances. The exclusions identified for NPDES permitted facilities are established to cover those facilities that use or generate one or more of the hazardous substances in their operation and, as a result, are discharging those substances in a manner that is approved by the EPA, although that discharge might be above the reportable quantities established by these regulations.

These regulations do not require a technology based treatment system to treat classical spills of hazardous substances, nor do they require spill prevention measures. While the possibility could exist that an owner, operator or person in charge of a facility might have to make some adjustment in his treatment system if he wishes to have a discharge caused by an on-site spill of a particular substance excluded from these regulations, these regulations in no way require such action. Thus, compliance with these regulations will not result in any direct costs to the regulated parties. The Agency has examined the incremental treatment costs for those seeking to comply with section 402 and avoid section 311 liability. This investigation has

indicated that in the majority of cases, the same treatment used to control the toxic pollutants in a particular discharge will also be capable of controlling the hazardous substances in the discharge. Incremental treatment costs in such cases for the hazardous substances would be insignificant. The costs of adjustments to treatment systems for control of hazardous substances under section 402 regulations are discussed in the Request for Additional Comments on Proposed Application Requirements for National Pollutant Discharge Elimination System (NPDES) Permits.

However, two types of expenses may be incurred because of violations of these regulations: Civil penalties and clean-up costs. Since economic impacts are generally based on compliance costs, not costs resulting from failure to comply, these two factors are not considered as direct impacts. This is particularly appropriate since in the absence of mandatory reporting of discharges of hazardous substances, there are little data on discharge events (i.e. number and size of discharges, types of materials spilled, resulting penalties, and associated clean-up costs). It is therefore very difficult to estimate the frequency of violations or the resulting costs.

As a result of the amendments to the statute, the potential penalties to be assessed under the proposed regulations are considerably simplified and reduced from those in the previous statute. The maximum penalty for a discharge from a land-based facility was set at $500,000 while a discharge from a vessel could result in a $5 million penalty. The penalty structure has now been both simplified and moderated (the maximum penalty for any discharge is now set at $50,000 unless it is the result of willful negligence or willful misconduct, where the penalty can reach $250,000). Therefore, the potential amounts of civil penalties will be substantially less than projected in the March 13, 1978 promulgation (43 FR 10479).

Response to Comments

(1) *Comment:* Several commenters objected to the Agency's assumption that reportable quantities for different hazardous substances should be considered additive in their toxic effects (proposed §117.3), citing lack of scientific support.

Response: The Agency agrees that the toxicity of hazardous substances is not necessarily additive or synergistic, and has therefore modified the regulations. The discharge of a mixture or solution is, however, subject to these regulations if a quantity equal to or greater than a reportable quantity of a specific hazardous substance is discharged.

(2) *Comment:* Several commenters believe that the reportable quantities were complicated, arbitrary, and inadequate. They stated that the quantities would not be harmful in all instances, and urged that concentration in receiving waters be considered.

Response: The Agency's system of utilizing five reportable quantity categories based on relative toxicity is anything but complicated, and is in fact designed to make it easier for a discharger to determine which incidents he must report. The reportable quantity determinations cannot be considered arbitrary because they comply with the recent amendments which report quantities to be those which may be harmful. In enacting those amendments, Congress was aware of and endorsed the reportable quantities promulgated today. (Congressional Record of October 14, 1978 (S 19259)). Congress also made it clear that the determination of reportable quantities does not require an assessment of actual harm in the variety of circumstances in which substances might be discharged, *id* at § 19258. Finally, Congress did not intend that circumstances surrounding the release (such as receiving water concentration) should be a factor in determining reportable quantities.

(3) *Comment:* One commenter asked that discharges of copper sulfate be excluded from the regulations when intentionally made to reservoirs to control algae.

Response: Copper sulfate is registered as a pesticide for controlling algae. When applied according to pesticide lable directions, the discharge is exempted by § 117.11(c). This exclusion has been expanded to provide that the use of pesticides pursuant to state pesticide permits, experimental use permits, and emergency exemptions are excluded from these regulations.

(4) *Comment:* One commenter objected to the use of "vinegar acid" as a synonym for acetic acid.

Response: The term "vinegar acid" is a well known synonym and was included to aid the public. The synonym "vinegar acid" was obtained from "The Condensed Chemical Dictionary," 7th. ed., G.C. Hanley, editor, published by Van Nostrand Reinhold Company.

(5) *Comment:* One commenter suggested that the discharge of calcium oxide (lime) be excluded from regulation when used to protect oyster farms from predators. Another commenter challenged the reportable quantities for calcium oxide and calcium hydroxide, and petitioned the Agency to remove lime from the list of hazardous substances.

Response: In response to the petition, the Agency is proposing elsewhere in this **Federal Register** to delete lime from 40 CFR Parts 116 and 117. Further information can be found in that notice.

(6) *Comment:* Several commenters contended that all discharges from facilities with 402 permits should be excluded from section 311.

Response: The 1978 amendments to section 311 do not authorize the broad exclusions requested by these commenters. The statutory distinction between discharges subject to section 311 and those subject to 402 is based not on the location of the discharge, but rather on the source and circumstances surrounding that discharge. Classic spills to navigable waters, regardless of whether they occur at permitted facilities, are clearly subject to 311 unless such discharges are subject to a permit condition requiring processing through a treatment system which was demonstrated capable of treating the spill.

(7) *Comment:* A few commenters suggested that the statute provides sufficient distinction between discharges subject to section 311 and those subject to 402, and that regulations were therefore unnecessary.

Response: The statute alone, without implementing regulations, simply will not provide sufficient information and guidance to regulated parties or state and federal officials. The regulations as revised, meet the intent of Congress, while providing more detailed information on their applicability.

(8) *Comment:* A few commenters suggested that EPA withhold issuance of these regulations until NPDES regulations, Best Management Practices (BMP) regulations, and Spill Prevention Control and Countermeasure (SPCC) regulations are promulgated.

Response: NPDES and BMP regulations have been promulgated (44 FR 32854, June 14, 1979). SPCC regulations were proposed last year (43 FR 39276, September 1, 1978). Revised NPDES application forms were proposed on June 14, 1979 (44 FR 34346; 44 FR 34393) and are further discussed elsewhere in this **Federal Register.** All Congressionally-mandated regulatory requirements which affect permitted facilities are being coordinated to the maximum extent possible. These regulations have been revised to make them compatible with related existing requirements and independent of proposed or contemplated requirements.

(9) *Comment:* Several commenters urged that applicability of these regulations be "phased-in" during the

permit process, and that time for compliance be provided.

Response: These regulations do not require time for compliance because their effect is to prohibit spills and other episodic discharges, not to prescribe required levels of treatment or other permit conditions. Chronic, anticipated intermittent discharges originating in the operating or treatment systems are exempt from these regulations, but will be regulated under section 402 of the CWA. A phase-in period is not appropriate for spill discharges, since on-site spills cannot be excluded unless and until the discharger demonstrates the capability to treat such spills.

(10) *Comment:* One commenter recommended that EPA headquarters review all permit applications at major facilities before excluding any dischargers from section 311.

Response: Such a review is unnecessary, and would inject an unwarranted layer of red tape into the permitting process, resulting in delays and overlapping responsibilities. The permitting authority, be it a state or regional EPA office, is better able to make any site-specific determinations required by these regulations.

(11) *Comment:* Several commenters contended that the first exclusion was too narrow, and should be interpreted to apply to permits which limit only conventional pollutants but do not limit hazardous substances.

Response: The amendments to section 311 were intended to distinguish between classic spills and discharges associated with manufacturing and treatment. The interpretation urged by these commenters would frustrate this intent in cases where a "classic spill" of hazardous substance occurred, but did not result in a violation of a traditional pollutant parameter. Moreover, certain discharges associated with manufacturing and treatment, but which are not specifically limited in a permit, would be exempt from section 311 under the third exclusion (§ 117.12(b)(3)). In addition, the first exclusion has been expanded, so that discharges in compliance with EPA designated "indicator" polluant parameters (44 FR 34396–99) and discharges in compliance with "application-based limits" (44 FR 34404–07) will be exempt from section 311. Thus, the Agency believes that § 117.12(b) as promulgated is consistent with Congress' intent.

(12) *Comment:* Several commenters were concerned that EPA had interpreted the second exclusion to narrowly, resulting in coverage under 311 of the discharges which should be subject to section 402. For example, a number of commenters noted that the statute calls for identification of the "circumstances" surrounding a discharge, but does not require a particular level of treatment, an issue they felt should be dealt with under section 402; some believed the definition of "public record" was too narrow; others stated that waste characterization (substance and amount) was inappropriate, technically impossible in some cases, and costly in terms of monitoring; a few commenters asked that the term "condition" be further explained and expanded.

Response: The Agency has revised the second exclusion in several respects. The regulations require treatment only where a permittee wishes to have on-site spills excluded from section 311 and covered by section 402. The level of such treatment would then be a section 402 matter. The definition of "public record" has been rewritten to include additional information considered in the issuance of the permit. Characterization of discharge waste streams will not be required where such streams result from manufacturing and treatment sources, since such discharges will already be covered by the third exclusion. Thus, the technical and analytical and economic problems which commenters stated would be associated with sampling and monitoring should not arise under these final regulations. However, identification of the "circumstances" surrounding a discharge does require identification of substances and amount of substances where a permittee wishes to make potential spill situations subject to a permit condition, and thus subject to section 402, not 311. For example, if a permittee believes he can treat an on-site spill, for example, a ruptured hose connection, he must provide the permitting authority all relevant information, including substance, amount, and proposed treatment. Based on this information, the permit writer will determine whether existing treatment is adequate, and whether the potential discharge can be excluded from section 311 coverage should it occur. Thus, a permittee does not have an unlimited right to a permit condition (and the resulting exclusion from section 311) for a discharge caused by an on-site spill unless he has demonstrated that his treatment system is actually capable of preventing the discharge.

In addition, a discharge resulting from an on-site spill, larger or more concentrated than the spill contemplated in the public record and made subject to a permit condition requiring treatment, will not be excluded from section 311. For example, discharges caused by leaks and minor spills from a large storage tank may be identified, reviewed, and made subject to a treatment requirement, and excluded from section 311. But a major failure of such tank, with resulting spill discharge, would be subject to the provisions of section 311.

(13) *Comment:* A number of commenters argued that EPA had interpreted the third exclusion too narrowly, particularly because it addressed primarily anticipated intermittent discharges and not continuous discharges, and because the exclusion ended upon promulgation of NPDES regulations and receipt of a new permit.

Response: The Agency has revised the third exclusion, which will no longer expire after promulgation of NPDES regulations. The Agency intends, however, to require more detailed information concerning continuous and anticipated intermittent discharges of hazardous substances caused by events occurring within the scope of relevant operating and treatment systems. (See notice in this **Federal Register**). Discharges caused by upsets, bypasses, and contamination of noncontact cooling waters are considered anticipated intermittent discharges and are excluded from section 311. However, on-site spills to cooling water and storm water will be subject to section 311 if discharged. Congress was aware of the possibility that such spills might be funneled through an outfall to avoid section 311, and intended the amendments to deter such avoidance schemes (*Congressional Record*, October 14, 1978 (S19259)).

(14) *Comment:* A few commenters objected to the *comment* which followed § 117.12(b)(3)(ii)(C) on the grounds that it was inconsistent with the statute.

Response: The Agency agrees and has deleted the comment. However, discharges caused by on-site spills of hazardous substances will not be considered "anticipated intermittent" discharges, but will be subject to section 311.

(15) *Comment:* Several commenters requested deletion of the *comment* following § 117.12(b)(3)(iii)(B) because it encouraged "second-guessing" regarding the type of discharge which occurred.

Response: The comment has been deleted. The reporting of discharges subject to section 402 are subject to the requirements in the NPDES regulations, not these regulations.

(16) *Comment:* Two commenters believed that the regulations permitted assessment of civil penalties under both sections 309 and 311.

Response: The statute (§ 311(b)(6)(E)) flatly prohibits assessment of two civil

penalties under sections 309 and 311 for the same discharge, and the Agency will not seek to assess dual penalties.

(17) *Comment:* Two commenters urged that the regulations give credit to permitted facilities for any hazardous substance present in their intake water.

Response: Permittees will not be responsible under these regulations for the presence of hazardous substances in the discharge of water received as intake water, unless such water is collected and later spilled in amounts greater than reportable quantities for those hazardous substances.

(18) *Comment:* A few commenters requested that EPA clarify that "reportable quantities" would not be used as a basis for determining permit effluent limitations.

Response: Effluent limitations for discharges subject to section 402 will continue to be based on technology factors and water quality criteria. Reportable quantities will play no role in permit limitations under section 402.

(19) *Comment:* A few commenters stated that the applicability of the regulations was unclear when they pertained to facilities which have submitted permit applications, but are adjudicating permits.

Response: The exclusions apply generally to any facility which has applied for a permit. If adjudication involves a permit condition as defined in the second exclusion, such a contested condition will not be deemed in effect, and the exclusion will not apply.

(20) *Comment:* Several commenters stated that the regulations did not specify whether discharges to land and air are subject to section 311.

Response: The issue is clarified in these final regulations, which apply to discharges into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the contiguous zone, or seaward from the contiguous zone, as provided in section 311(b)(3). Discharges to land or air which do not reach the previously mentioned waters and shorelines are not subject to section 311, but may be subject to section 504 of the act or other law. Of course where hazardous substances seep, leak, or wash into navigable waters or adjoining shorelines, the discharger must notify the Coast Guard.

(21) *Comment:* One commenter suggested that the requirement to notify the Coast Guard of a discharge (section 311(b)(5); 40 CFR 117.21) should be the responsibility of the dispatcher in the case of a discharge from a train or truck. The commenter pointed out that a train engineer or truck driver may not have immediate access to a telephone, but may have alternate means of contacting his dispatcher, who in turn could phone the Coast Guard.

Response: The Act requires notification by the "person in charge" of the facility or vessel from which the discharge occurs. The term "person in charge" may include individuals, firms, corporations or partnerships. Because the purpose of the notification requirement is to ensure quick response and clean-up of discharged hazardous substances, the requirement is fullfilled when notification is made in the most expeditious manner possible. EPA recognizes that the fastest means of notification may, in some circumstances, be accomplished by having a person present at the discharge site (e.g., a truck driver) contact a third party within the firm or corporation (e.g., a dispatcher), who in turn will notify the Coast Guard. This procedure would comply with the statutory requirement if it results in notification of the Coast Guard in the fastest means possible under the circumstances.

(22) *Comment:* A few commenters objected to the requirement as proposed in § 117.22 that discharges be reported "immediately", stating that it was unfair to require reporting prior to the time that the person in charge had knowledge of the discharge.

Response: The Agency agrees with the comment and has revised the regulation accordingly. Notification must be made immediately upon learning of the discharge.

(23) *Comment:* One commenter asked that the criminal penalty for failure to report a discharge be deleted.

Response: The statute itself calls for the criminal penalty, and EPA cannot delete a statutory penalty.

(24) *Comment:* One commenter suggested that the section 311(b)(6)(B) penalty be applied to discharges of oil as well as hazardous substances.

Response: The legislative history clearly indicates that the section 311(b)(6)(B) penalty option only be used for discharges of hazardous substances.

(25) *Comment:* One commenter inquired whether neutralizing an acid spill with a basic material constituted and additional spill.

Response: The Agency believes that it would be contrary to the spirit of the law to penalize persons for undertaking mitigation actions which are encouraged under section 311. At the same time, the Agency believes that care must be exercised in carrying out mitigation actions. The Agency intends to promulgate removal regulations at a later date. Accordingly, § 117.11(e) provides that mitigation actions undertaken on the instructions or with the approval of the Federal On-Scene Coordinator pursuant to 40 CFR Part 1510 (The National Oil and Hazardous Substance Contingency Plan), or pursuant to 33 CFR 153.105(c) (Pollution by Oil or Hazardous Substances), or in accordance with applicable section 311(j)(1)(A) regulations, when promulgated, do not violate section 311.

(26) *Comment:* One commenter suggested that hazardous spills reporting be kept at a local level, specifically at the State NPDES level.

Response: Notwithstanding any other reporting arrangements, for purposes of section 311, any discharge of an oil or hazardous substance in reportable quantities must be reported immediately to the appropriate Federal agency. Executive Order 11735 designated the U.S. Coast Guard as the appropriate agency to receive such notices. Failure to report carries a criminal penalty.

(27) *Comment:* One commenter expressed concern that regulations to report every spill encourage non-reporting.

Response: Spills in reportable quantities must be reported if they reach navigable waters, adjoining shorelines, the contiguous zone, or other waters described in section 311(b)(3) of the Act. The Agency from historical experience has found that regulations requiring the reporting of sheens of oil did not encourage non-reporting.

(28) *Comment:* One commenter, an insurance syndicate, states that the Act actually discourages quick clean-up by the discharger in the case of a large spill, where the clean-up costs exceed the maximum liability limits of section 311(f). The commenter indicated that it advised its insureds not to commence clean-up in such a situation, since expenses of clean-up may not be repaid or set-off against the statutory liability limits. The commenter was concerned because a discharger's failure to assist in clean-up is a factor to be considered in initiating a higher civil penalty.

Response: As noted by the commenter, the situation complained of is called for by the statute and does not arise from these regulations. The purpose of section 311 is to prohibit the discharge of oil and hazardous substances. The perceived "predicament" arises only when the discharger has violated the Act by discharging a hazardous substance. The Agency believes that it is irresponsible and clearly contrary to the spirit of the Act for a discharger to refuse to clean-up a discharge of his own making. This is the apparent reason for Congress' emphasis on mitigation as a factor in civil penalty assessment. The Agency

intends to follow the Congressional mandate and seek higher civil penalties where a discharger has not taken appropriate mitigation action.

(29) *Comment:* A few commenters requested that civil penalties be assessed only where a discharge resulted in demonstrable harm, and that absence of harm be considered defense in any penalty proceeding. The commenters stated that *United States* v. *Chevron Oil.* 583 F. 2d. 1357 (5th Cir., 1978) required such an interpretation.

Response: The *Chevron* decision interpreted the statute prior to the 1978 amendments, when the statute prohibited discharges that "will be harmful". The amendments changed this language to "may be harmful", to "make it clear that the determination of reportable quantities* * * does not require an assessment or actual harm in the variety of circumstances in which such substances might be discharged" (Congressional Record of October 14, 1978 (H 13599)). Since actual harm need not be proved in order for the discharge prohibition to attach, it would be inconsistent with Congressional intent to allow a defendant to try to disprove actual harm in a civil penalty proceeding.

It should be noted, however, that gravity of the offense will be considered in penalty proceedings: accordingly, the size of the discharge and degree of harm will be a factor.

(30) *Comment:* Several commenters stated that the recent amendments to section 311 require changes to existing regulations governing the discharge of oil.

Response: The regulations promulgated today apply only to hazardous substances. The Agency intends to make appropriate revisions to regulations concerning oil in the near future.

(31) *Comment:* One commenter stated that § 117.32 should be revised to delete the last sentence dealing with liability for clean-up costs arising from discharges excluded from section 311 and these regulations.

Response: The Agency agrees that the provision is not appropriate in these regulations. However, section 311(b)(6)(D) provides that any clean-up costs associated with certain discharges regulated under section 402 are recoverable from the discharger in an action brought under section 309(d) of the Act. The Agency will bring such actions in appropriate circumstances.

(32) *Comment:* A few commenters objected to the fact that the regulation applies to discharges of reportable quantities "in any 24-hour period". Most commenters requested the time be shortened, arguing that a "shock load" effect would occur only if the discharge occurred very quickly.

Response: Reportable quantities have little meaning unless a time period for discharge of that quantity is specified. Neither section 311 or its legislative history provide a time limit for the applicability of reportable quantities. Thus, implementing regulations may be applied to any discharge over any period of time. The primary thrust of these regulations has been directed toward the control of short-term nonroutine discharges of hazardous substances. In addition, the definition of discharge explicitly includes such things as "leaking", which may encompass considerable time. The association of a maximum time limit over which the discharge of a reportable quantity must occur to result in a violation will provide additional definition to the reporting requirement under section 311(b)(5). For the purpose of this regulation a maximum time period associated with the discharge of a harmful quantity has been established as 24 hours. It is believed that this time period will permit regulatory control over such discharges of hazardous substances and provide an additional degree of resolution to the reporting requirement.

(33) *Comment:* One commenter suggested that § 117.11(d) be amended to provide that discharges in compliance with permit conditions issued under section 3005 of the Resource Conservation and Recovery Act (RCRA) be excluded from these regulations. Although the proposed regulations excluded discharges in compliance with regulations under section 3004, the commenter noted that section 3005 permit conditions will not necessarily be identical to the requirements of the section 3004 regulations.

Response: The Agency agrees with this comment and has modified these regulations accordingly. Section 3005 permits may only be issued to a facility upon a showing that it meets the requirements of section 3004 and 3005 for treatment, storage, or disposal of hazardous wastes. Thus, the permit issues that all activities will be conducted in an environmentally acceptable manner. However, section 3005 does authorize the Administrator (or a State) to incorporate a compliance schedule in a permit. Permits may also allow variances from certain section 3004 requirements. The revised regulations are consistent with the Agency policy of excluding from section 311 only those discharges which are properly regulated under other authority. At the same time, it clarifies that a discharge in accordance with a section 3005 permit (which may contain a compliance schedule or a variance from a 3004 requirement) also is excluded from section 311.

(34) *Comment:* One commenter suggested that these regulations should not apply to mixtures or solutions which contain a hazardous substance in low concentrations, since such concentrations will not necessarily be harmful.

Response: The amended statute requires the determination of quantities which "may be harmful" and the legislative history makes it clear that such quantities need not be harmful in all cases. Moreover, the statute contains no exemption for solutions or mixtures but calls for absolute quantities. It cannot be assumed that the discharge of a dilute concentration of a hazardous substance may not result in some harm.

Evaluation Plan

Under the amendment to section 311, the Agency is required to "conduct a study and report to the Congress on methods, mechanisms, and procedures to create incentives to achieve a higher standard of care in all aspects of the management and movement of hazardous substances * * *. The Administrator shall include in such a study (1) limits of liability, (2) liability of third party damages, (3) penalties and fees, (4) spill prevention plans, (5) current practices in the insurance and banking industries, and (6) whether the penalty enacted in subclause (bb) of clause (iii) of subparagraph (B) of subsection (b)(2) of section 311 of Pub. L. 92–500 should be enacted." (Pub. L. 95–576.)

This study will provide the Agency with a more complete picture of the effectiveness of these regulations and possible economic impacts, and will allow the Agency to evaluate any procedural difficulties encountered in implementing the regulations. The Agency is required to complete this study by May 1980. Plans are now being completed for the conduct of this study and the Agency will solicit assistance from interested parties in the performance of this study.

Deferral of Regulations as They Apply to Discharges From Common Carriers

In the February 16, 1979 proposed regulations, EPA published notice that it would defer implementing these regulations as they apply to discharges from common carriers. This is because common carriers are required to accept for transport those shipments offered in compliance with applicable tariffs. Currently, not all hazardous substances

are adequately identified by existing tariffs. Thus, in some circumstances, common carriers may have no means of determining when they are transporting hazardous substances. In other words, common carriers may not refuse to accept a shipment which may contain unidentified hazardous substances, nor could they report a spill of a hazardous substance unless they had knowledge of its presence.

Private and contract carriers, on the other hand, may request the shipper to identify any shipments containing hazardous substances, and may then elect either to transport or to refuse to do so. In any case, they have the means to determine if hazardous substances are on board, and thus the ability to take actions to prevent a spill, and the knowledge to report a spill should it occur. Therefore, these regulations will be applicable in thirty days to the discharge of hazardous substances transported under private or contract carriage.

With respect to common carriers, tariff changes can be accomplished by the common carriers themselves. Since designation of hazardous substances was promulgated six months ago, it is anticipated that common carriers have already taken steps to initiate appropriate tariff changes. Therefore, the Agency expects that these tariff changes can be made effective within four (4) months. EPA will publish notice in the Federal Register announcing the effective date of these regulations as they apply to discharges of hazardous substances which have been offered to common carriers who are required to accept such substances for shipment in compliance with applicable tariffs.

The Agency recognizes that this deferral of effective date for certain discharges may result in some unreported spills, and the inability of the government to assess civil penalties or removal cost liabilities for some spills. However, it would be unreasonable to attach such liabilities to carriers who are otherwise effectively precluded by Federal law from obtaining knowledge of whether their cargoes include hazardous substances. Moreover, the Agency believes that common carriers and shippers will act in good faith to do all in their power to bring about tariff changes.

Dated: August 20, 1979.

Douglas A. Costle,

Administrator.

Part 117 is added as follows:

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

Subpart A—General Provisions

Sec.
117.1 Definitions.
117.2 Abbreviations.
117.3 Determination of reportable quantities.

Subpart B—Applicability

117.11 General applicability.
117.12 Applicability to discharges from facilities with NPDES permits.
117.13 Applicability to discharges from publicly owned treatment works and their users.
117.14 Demonstration projects.

Subpart C—Notice of Discharge of a Reportable Quantity

117.21 Notice.
117.22 Penalties.
117.23 Liabilities for removal.

Authority: Secs. 311 and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), ("the Act") and Executive Order 11735.

Subpart A—General Provisions

§ 117.1 Definitions.

As used in this part, all terms shall have the meanings stated in 40 CFR Part 116.

(a) "Reportable quantities" means quantities that may be harmful as set forth in § 117.3, the discharge of which is a violation of section 311(b)(3) and requires notice as set forth in § 117.21.

(b) "Administrator" means the Administrator of the Environmental Protection Agency ("EPA").

(c) "Mobile source" means any vehicle, rolling stock, or other means of transportation which contains or carries a reportable quantity of a hazardous substance.

(d) "Public record" means the NPDES permit application or the NPDES permit itself and the "record for final permit" as defined in 40 CFR 124.122.

(e) "National Pretreatment Standard" or "Pretreatment Standard" means any regulation containing pollutant discharge limits promulgated by the EPA in accordance with section 307 (b) and (c) of the Act, which applies to industrial users of a publicly owned treatment works. It further means any State or local pretreatment requirement applicable to a discharge and which is incorporated into a permit issued to a publicly owned treatment works under section 402 of the Act.

(f) "Publicly Owned Treatment Works" or "POTW" means a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act). This definition includes any sewers that convey wastewater to such a treatment works, but does not include pipes, sewers or other conveyances not connected to a facility providing treatment. The term also means the municipality as defined in section 502(4) of the Act, which has jurisdiction over the indirect discharges to and the discharges from such a treatment works.

(g) "Remove" or "removal" refers to removal of the oil or hazardous substances from the water and shoreline or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

(h) "Contiguous zone" means the entire zone established by the United States under Article 24 of the Convention on the Territorial Sea and Contiguous Zone.

(i) "Navigable waters" means "waters of the United States, including the territorial seas." This term includes:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters identified in paragraphs (i)(1)–(4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (i)(1)–(5) of this section ("Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally

included playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds): *Provided,* That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(j) "Process waste water" means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.

§ 117.2 Abbreviations.

NPDES equals National Pollutant Discharge Elimination System. RQ equals reportable quantity.

§ 117.3 Determination of reportable quantities.

The quantity listed with each substance in Table 117.3 is determined to be the reportable quantity for that substance.

Table 117.3—Reportable Quantities of Hazardous Substances

Note.—The first number under the column headed "RQ" is the reportable quantity in pounds. The number in parentheses is the metric equivalent in kilograms. For convenience, the table contains a column headed "Category" which lists the code letters "X", "A", "B", "C" and "D" associated with reportable quantities of 1, 10, 100, 1000 and 5000 pounds respectively.

Material	Category	RQ in pounds (kilograms)
Acetaldehyde	C	1,000 (454)
Acetic acid	C	1,000 (454)
Acetic anhydride	C	1,000 (454)
Acetone cyanohydrin	A	10 (4.54)
Acetyl bromide	D	5,000 (2,270)
Acetyl chloride	D	5,000 (2,270)
Acrolein	X	1 (0.454)
Acrylonitrile	B	100 (45.4)
Adipic acid	D	5,000 (2,270)
Aldrin	X	1 (0.454)
Allyl alcohol	B	100 (45.4)
Allyl chloride	C	1,000 (454)
Aluminum sulfate	D	5,000 (2,270)
Ammonia	B	100 (45.4)
Ammonium acetate	D	5,000 (2,270)
Ammonium benzoate	D	5,000 (2,270)
Ammonium bicarbonate	D	5,000 (2,270)
Ammonium bichromate	C	1,000 (454)
Ammonium bifluoride	D	5,000 (2,270)
Ammonium bisulfite	D	5,000 (2,270)
Ammonium carbamate	D	5,000 (2,270)
Ammonium carbonate	D	5,000 (2,270)
Ammonium chloride	D	5,000 (2,270)
Ammonium chromate	C	1,000 (454)
Ammonium citrate	D	5,000 (2,270)
Ammonium fluoborate	D	5,000 (2,270)
Ammonium fluoride	D	5,000 (2,270)
Ammonium hydroxide	C	1,000 (454)
Ammonium oxalate	D	5,000 (2,270)
Ammonium silicofluoride	C	1,000 (454)
Ammonium sulfamate	D	5,000 (2,270)
Ammonium sulfide	D	5,000 (2,270)
Ammonium sulfite	D	5,000 (2,270)
Ammonium tartrate	D	5,000 (2,270)
Ammonium thiocyanate	D	5,000 (2,270)
Ammonium thiosulfate	D	5,000 (2,270)
Amyl acetate	C	1,000 (454)
Aniline	C	1,000 (454)
Antimony pentachloride	C	1,000 (454)
Antimony potassium tartrate	C	1,000 (454)
Antimony tribromide	C	1,000 (454)
Antimony trichloride	C	1,000 (454)
Antimony trifluoride	C	1,000 (454)
Antimony trioxide	D	5,000 (2,270)
Arsenic disulfide	D	5,000 (2,270)
Arsenic pentoxide	D	5,000 (2,270)
Arsenic trichloride	D	5,000 (2,270)
Arsenic trioxide	D	5,000 (2,270)
Arsenic trisulfide	D	5,000 (2,270)
Barium cyanide	A	10 (4.54)
Benzene	C	1,000 (454)
Benzoic acid	D	5,000 (2,270)
Benzonitrile	C	1,000 (454)
Benzoyl chloride	C	1,000 (454)
Benzyl chloride	B	100 (45.4)
Beryllium chloride	D	5,000 (2,270)
Beryllium fluoride	D	5,000 (2,270)
Beryllium nitrate	D	5,000 (2,270)
Butyl acetate	D	5,000 (2,270)
n-Butyl phthalate	B	100 (45.4)
Butylamine	C	1,000 (454)
Butyric acid	D	5,000 (2,270)
Cadmium acetate	B	100 (45.4)
Cadmium bromide	B	100 (45.4)
Cadmium chloride	B	100 (45.4)
Calcium arsenate	C	1,000 (454)
Calcium arsenite	C	1,000 (454)
Calcium carbide	D	5,000 (2,270)
Calcium chromate	C	1,000 (454)
Calcium cyanide	A	10 (4.54)
Calcium dodecylbenzenesulfonate.	C	1,000 (454)
Calcium hydroxide	D	5,000 (2,270)
Calcium hypochlorite	B	100 (45.4)
Calcium oxide	D	5,000 (2,270)
Captan	A	10 (4.54)
Carbaryl	B	100 (45.4)
Carbofuran	A	10 (4.54)
Carbon disulfide	D	5,000 (2,270)
Carbon tetrachloride	D	5,000 (2,270)
Chlordane	X	1 (0.454)
Chlorine	A	10 (4.54)
Chlorobenzene	B	100 (45.4)
Chloroform	D	5,000 (2,270)
Chlorpyrifos	X	1 (0.454)
Chlorosulfonic acid	C	1,000 (454)
Chromic acetate	C	1,000 (454)
Chromic acid	C	1,000 (454)
Chromic sulfate	C	1,000 (454)
Chromous chloride	C	1,000 (454)
Cobaltous bromide	C	1,000 (454)
Cobaltous formate	C	1,000 (454)
Cobaltous sulfamate	C	1,000 (454)
Coumaphos	A	10 (4.54)
Cresol	C	1,000 (454)
Crotonal dehyde	B	100 (45.4)
Cupric acetate	B	100 (45.4)
Cupric acetoarsenite	B	100 (45.4)
Cupric chloride	A	10 (4.54)
Cupric nitrate	B	100 (45.4)
Cupric oxalate	B	100 (45.4)
Cupric sulfate	A	10 (4.54)
Cupric sulfate ammoniated	B	100 (45.4)
Cupric tartrate	B	100 (45.4)
Cyanogen chloride	A	10 (4.54)
Cyclohexane	C	1,000 (454)
2,4–D Acid	B	100 (45.4)
2,4–D Esters	B	100 (45.4)
DDT	X	1 (0.454)
Diazinon	X	1 (0.454)
Dicamba	C	1,000 (454)
Dichlobenil	C	1,000 (454)
Dichlone	X	1 (0.454)
Dichlorobenzene	B	100 (45.4)
Dichloropropane	D	5,000 (2,270)
Dichloropropene	D	5,000 (2,270)
Dichloropropene-Dichloropropane Mixture.	D	5,000 (2,270)
2,2-Dichloropropionic acid	D	5,000 (2,270)
Dichlorvos	A	10 (4.54)
Dieldrin	X	1 (0.454)
Diethylamine	C	1,000 (454)
Dimethylamine	C	1,000 (454)
Dinitrobenzene	C	1,000 (454)
Dinitrophenol	C	1,000 (454)
Dinitrotoluene	C	1,000 (454)
Diquat	C	1,000 (454)
Disulfoton	X	1 (0.454)
Diuron	B	100 (45.4)
Dodecylbenzenesulfonic acid	C	1,000 (454)
Endosulfan	X	1 (0.454)
Endrin	X	1 (0.454)
Epichlorohydrin	C	1,000 (454)
Ethion	A	10 (4.54)
Ethylbenzene	C	1,000 (454)
Ethylenediamine	C	1,000 (454)
Ethylene dibromide	C	1,000 (454)
Ethylene dichloride	D	5,000 (2,270)
EDTA	D	5,000 (2,270)
Ferric ammonium citrate	C	1,000 (454)
Ferric ammonium oxalate	C	1,000 (454)
Ferric chloride	C	1,000 (454)
Ferric fluoride	B	100 (45.4)
Ferric nitrate	C	1,000 (454)
Ferric sulfate	C	1,000 (454)
Ferrous ammonium sulfate	C	1,000 (454)
Ferrous chloride	B	100 (45.4)
Ferrous sulfate	C	1,000 (454)
Formaldehyde	C	1,000 (454)
Formic acid	D	5,000 (2,270)
Fumaric acid	D	5,000 (2,270)
Furfural	C	1,000 (454)
Guthion	X	1 (0.454)
Heptachlor	X	1 (0.454)
Hexachlorocyclopentadiene	X	1 (0.454)
Hydrochloric acid	D	5,000 (2,270)
Hydrofluoric acid	D	5,000 (2,270)
Hydrogen cyanide	A	10 (4.54)
Hydrogen sulfide	B	100 (45.4)
Isoprene	C	1,000 (454)
Isopropanolamine dodecylbenzenesulfonate.	C	1,000 (454)
Kelthane	D	5,000 (2,270)
Kepone	X	1,000 (454)
Lead acetate	D	5,000 (2,270)
Lead arsenate	D	5,000 (2,270)
Lead Chloride	D	5,000 (2,270)
Lead fluoborate	D	5,000 (2,270)
Lead fluoride	C	1,000 (454)
Lead iodide	D	5,000 (2,270)
Lead nitrate	D	5,000 (2,270)
Lead stearate	D	5,000 (2,270)
Lead sulfate	D	5,000 (2,270)
Lead sulfide	D	5,000 (2,270)
Lead thiocyanate	D	5,000 (2,270)
Lindane	X	1 (0.454)
Lithium chromate	C	1,000 (454)
Malathion	A	10 (4.54)
Maleic acid	D	5,000 (2,270)
Maleic anhydride	D	5,000 (2,270)
Mercaptodimethur	B	100 (45.4)
Mercuric cyanide	X	1 (0.454)
Mercuric nitrate	A	10 (4.54)
Mercuric sulfate	A	10 (4.54)
Mercuric thiocyanate	A	10 (4.54)
Mercurous nitrate	A	10 (4.54)
Methoxychlor	X	1 (0.454)
Methyl mercaptan	B	100 (45.4)
Methyl methacrylate	D	5,000 (2,270)
Methyl parathion	B	100 (45.4)
Mevinphos	X	1 (0.454)
Mexacarbate	C	1,000 (454)
Monoethylamine	C	1,000 (454)
Monomethylamine	C	1,000 (454)
Naled	A	10 (4.54)
Naphthalene	D	5,000 (2,270)
Naphthenic acid	B	100 (45.4)
Nickel ammonium sulfate	D	5,000 (2,270)
Nickel chloride	D	5,000 (2,270)
Nickel hydroxide	C	1,000 (454)
Nickel nitrate	D	5,000 (2,270)
Nickel sulfate	D	5,000 (2,270)
Nitric acid	C	1,000 (454)
Nitrobenzene	C	1,000 (454)
Nitrogen dioxide	C	1,000 (454)
Nitrophenol	C	1,000 (454)
Nitrotoluene	C	1,000 (454)
Paraformaldehyde	C	1,000 (454)
Parathion	X	1 (0.454)
Pentachlorophenol	A	10 (4.54)
Phenol	C	1,000 (454)
Phosgene	D	5,000 (2,270)
Phosphoric acid	D	5,000 (2,270)
Phosphorus	X	1 (0.454)
Phosphorus oxychloride	D	5,000 (2,270)
Phosphorus pentasulfide	B	100 (45.4)
Phosphorus trichloride	D	5,000 (2,270)
Polychlorinated biphenyls	A	10 (4.54)
Potassium arsenate	C	1,000 (454)
Potassium arsenite	C	1,000 (454)
Potassium bichromate	C	1,000 (454)
Potassium chromate	C	1,000 (454)
potassium cyanide	A	10 (4.54)
Potassium hydroxide	C	1000(454)
Potassium permanganate	B	100 (45.4)

Material	Category	RQ in pounds (kilograms)
Propargite	A	10 (4.54)
Propionic acid	D	5,000 (2,270)
Propionic anhydride	D	5,000 (2,270)
Propylene oxide	D	5,000 (2,270)
Pyrethrins	C	1,000 (454)
Quinoline	C	1,000 (454)
Resorcinal	C	1,000 (454)
Selenium oxide	C	1,000 (454)
Silver nitrate	X	1 (0.454)
Sodium	C	1,000 (454)
Sodium arsenate	C	1,000 (454)
Sodium arsenite	C	1,000 (454)
Sodium bichromate	C	1,000 (454)
Sodium bifluoride	D	5,000 (2,270)
Sodium bisulfite	D	5,000 (2,270)
Sodium chromate	C	1,000 (454)
Sodium cyanide	A	10 (4.54)
Sodium dodecylbenzenesulfonate	C	1,000 (454)
Sodium fluoride	D	5,000 (2,270)
Sodium hydrosulfide	D	5,000 (2,270)
Sodium hydroxide	C	1,000 (454)
Sodium hypochlorite	B	100 (45.4)
Sodium methylate	C	1,000 (454)
Sodium nitrite	B	100 (45.4)
Sodium phosphate, dibasic	D	5,000 (2,270)
Sodium phosphate, tribasic	D	5,000 (2,270)
Sodium selenite	C	1,000 (454)
Strontium chromate	C	1,000 (454)
Strychnine	A	10 (4.54)
Styrene	C	1,000 (454)
Sulfuric acid	C	1,000 (454)
Sulfur monochloride	C	1,000 (454)
2,4,5–T acid	B	100 (45.4)
2,4,5–T amines	B	100 (45.4)
2,4,5–T esters	B	100 (45.4)
2,4,5–T salts	B	100 (45.4)
2,4,5–TP acid	B	100 (45.4)
2,4,5–TP acid esters	B	100 (45.4)
TDE	X	1 (0.454)
Tetraethyl lead	B	100 (45.4)
Tetraethyl pyrophosphate	B	100 (45.4)
Thallium sulfate	C	1,000 (454)
Toluene	C	1,000 (454)
Toxaphene	X	1 (0.454)
Trichlorfon	C	1,000 (454)
Trichloroethylene	C	1,000 (454)
Trichlorophenol	A	10 (4.54)
Triethanolamine dodecylbenzenesulfonate	C	1,000 (454)
Triethylamine	D	5,000 (2,270)
Trimethylamine	C	1,000 (454)
Uranyl acetate	D	5,000 (2,270)
Uranyl nitrate	D	5,000 (2,270)
Vanadium pentoxide	C	1,000 (454)
Vanadyl sulfate	C	1,000 (454)
Vinyl acetate	C	1,000 (454)
Vinylidene chloride	D	5,000 (2,270)
Xylene	C	1,000 (454)
Xylenol	C	1,000 (454)
Zinc acetate	C	1,000 (454)
Zinc ammonium chloride	D	5,000 (2,270)
Zinc borate	C	1,000 (454)
Zinc bromide	D	5,000 (2,270)
Zinc carbonate	C	1,000 (454)
Zinc chloride	D	5,000 (2,270)
Zinc cyanide	A	10 (4.54)
Zinc fluoride	C	1,000 (454)
Zinc formate	C	1,000 (454)
Zinc hydrosulfite	C	1,000 (454)
Zinc nitrate	D	5,000 (2,270)
Zinc phenolsulfonate	D	5,000 (2,270)
Zinc phosphide	C	1,000 (454)
Zinc silicofluoride	D	5,000 (2,270)
Zinc sulfate	C	1,000 (454)
Zirconium nitrate	D	5,000 (2,270)
Zirconium potassium fluoride	D	5,000 (2,270)
Zirconium sulfate	D	5,000 (2,270)
Zirconium tetrachloride	D	5,000 (2,270)

Subpart B—Applicability

§ 117.11 General applicability.

This regulation sets forth a determination of the reportable quantity for each substance designated as hazardous in 40 CFR Part 116. The regulation applies to quantities of designated substances equal to or greater than the reportable quantities, when discharged into or upon the navigable waters of the United States, adjoining shorelines, into or upon the contiguous zone, or beyond the contiguous zone as provided in section 311(b)(3) of the Act, except to the extent that the owner or operator can show such that discharges are made:

(a) In compliance with a permit issued under the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1401 et seq.);

(b) In compliance with approved water treatment plant operations as specified by local or State regulations pertaining to safe drinking water;

(c) Pursuant to the label directions for application of a pesticide product registered under section 3 or section 24 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended (7 U.S.C. 136 et seq.), or pursuant to the terms and conditions of an experimental use permit issued under section 5 of FIFRA, or pursuant to an exemption granted under section 18 of FIFRA;

(d) In compliance with the regulations issued under section 3004 or with permit conditions issued pursuant to section 3005 of the Resource Conservation and Recovery Act (90 Stat. 2795; 42 U.S.C. 6901);

(e) In compliance with instructions of the On-Scene Coordinator pursuant to 40 CFR 1510 (the National Oil and Hazardous Substances Pollution Plan) or 33 CFR 153.10(e) (Pollution by Oil and Hazardous Substances) or in accordance with applicable removal regulations as required by section 311(j)(1)(A);

(f) In compliance with a permit issued under § 165.7 of Title 14 of the State of California Administrative Code;

(g) From a properly functioning inert gas system when used to provide inert gas to the cargo tanks of a vessel;

(h) From a permitted source and are excluded by § 117.12 of this regulation;

(i) To a POTW and are specifically excluded or reserved in § 117.13; or

(j) In compliance with a permit issued under section 404(a) of the Clean Water Act or when the discharges are exempt from such requirements by section 404(f) or 404(r) of the Act (33 U.S.C. 1344(a), (f), (r)).

§ 117.12 Applicability to discharges from facilities with NPDES permits.

(a) This regulation does not apply to:

(1) Discharges in compliance with a permit under section 402 of this Act;

(2) Discharges resulting from circumstances identified, reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of this Act, and subject to a condition in such permit;

(3) Continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of this Act, which are caused by events occurring within the scope of the relevant operating or treatment systems; or

(b) A discharge is "in compliance with a permit issued under section 402 of this Act" if the permit contains an effluent limitation specifically applicable to the substance discharged or an effluent limitation applicable to another waste parameter which has been specifically identified in the permit as intended to limit such substance, and the discharge is in compliance with the effluent limitation.

(c) A discharge results "from circumstances identified, reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of the Act, and subject to a condition in such permit," whether or not the discharge is in compliance with the permit, where:

(1) The permit application, the permit, or another portion of the public record contains documents that specifically identify:

(i) The substance and the amount of the substance; and

(ii) The origin and source of the substance; and

(iii) The treatment which is to be provided for the discharge either by:

(A) An on-site treatment system separate from any treatment system treating the permittee's normal discharge; or

(B) A treatment system designed to treat the permittee's normal discharge and which is additionally capable of treating the identified amount of the identified substance; or

(C) Any combination of the above; and

(2) The permit contains a requirement that the substance and amounts of the substance, as identified in § 117.12(c)(1)(i) and § 117.12(c)(1)(ii) be treated pursuant to § 117.12(c)(1)(iii) in the event of an on-site release; and

(3) The treatment to be provided is in place.

(d) A discharge is a "continuous or anticipated intermittent discharge from a point source, identified in a permit or permit application under section 402 of this Act, and caused by events occurring within the scope of the relevant operating or treatment systems," whether or not the discharge is in compliance with the permit, if:

(1) The hazardous substance is discharged from a point source for

which a permit application has been submitted; and

(2) The discharge of the hazardous substance results from:

(i) The contamination of noncontact cooling water or storm water, provided that such cooling water or storm water is not contaminated by an on-site spill of a hazardous substance; or

(ii) A continuous or anticipated intermittent discharge of process waste water, and the discharge originates within the manufacturing or treatment systems; or

(iii) An upset or failure of a treatment system or of a process producing a continuous or anticipated intermittent discharge where the upset or failure results from a control problem, an operator error, a system failure or malfunction, an equipment or system startup or shutdown, an equipment wash, or a production schedule change, provided that such upset or failure is not caused by an on-site spill of a hazardous substance.

§ 117.13 Applicability to discharges from publicly owned treatment works and their users.

(a) [Reserved], with the exception of § 117.13(b) below,

(b) These regulations apply to all discharges of reportable quantities to a POTW, where the discharge originates from a mobile source, except where such source has contracted with, or otherwise received written permission from the owners or operators of the POTW to discharge that quantity, and the mobile source can show that prior to accepting the substance from an industrial discharger, the substance had been treated to comply with any effluent limitation under sections 301, 302 or 306 or pretreatment standard under section 307 applicable to that facility.

§ 117.14 Demonstration projects.

Notwithstanding any other provision of this part, the Administrator of the Environmental Protection Agency may, on a case-by-case basis, allow the discharge of designated hazardous substances in connection with research or demonstration projects relating to the prevention, control, or abatement of hazardous substance pollution. The Administrator will allow such a discharge only where he determines that the expected environmental benefit from such a discharge will outweigh the potential hazard associated with the discharge.

Subpart C—Notice of Discharge of a Reportable Quantity

§ 117.21 Notice.

Any person in charge of a vessel or an onshore or an offshore facility shall, as soon as he has knowledge of any discharge of a designated hazardous substance from such vessel or facility in quantities equal to or exceeding in any 24-hour period the reportable quantity determined by this Part, immediately notify the appropriate agency of the United States Government of such discharge. Notice shall be given in accordance with such procedures as the Secretary of Transportation has set forth in 33 CFR 153.203. This provision applies to all discharges not specifically excluded or reserved by another section of these regulations.

§ 117.22 Penalties.

(a) Any person in charge of a vessel or an onshore or offshore facility who fails to notify the United States Government of a prohibited discharge pursuant to § 117.21 (except in the case of a discharge beyond the contiguous zone, where the person in charge of a vessel is not otherwise subject to the jurisdiction of the United States) shall be subject to a fine of not more than $10,000 or imprisonment for not more than one year, or both, pursuant to section 311(b)(5).

(b) The owner, operator or person in charge of a vessel or an onshore or offshore facility from which is discharged a hazardous substance designated in 40 CFR Part 116 in a quantity equal to or exceeding in any 24-hour period, the reportable quantity established in this Part (except in the case of a discharge beyond the contiguous zone, where the person in charge of a vessel is not otherwise subject to the jurisdiction of the United States), shall be assessed a civil penalty of up to $5,000 per violation under section 311(b)(6)(A). Alternatively, upon a determination by the Administrator, a civil action will be commenced under section 311(b)(6)(B) to impose a penalty not to exceed $50,000 unless such discharge is the result of willful negligence or willful misconduct within the privity and knowledge of the owner, operator, or person in charge, in which case the penalty shall not exceed $250,000.

Note: The Adminstrator will take into account the gravity of the offense and the standard of care manifest by the owner, operator, or person in charge in determining whether a civil action will be commenced under section 311(b)(6)(B). The gravity of the offense will be interpreted to include the size of the discharge, the degree of danger or harm to the public health, safety, or the environment, including consideration of toxicity, degradability, and dispersal characteristics of the substance, previous spill history, and previous violation of any spill prevention regulations. Particular emphasis will be placed on the standard of care and the extent of mitigation efforts manifest by the owner, operator, or person in charge.

§ 117.23 Liabilities for removal.

In any case where a substance designated as hazardous in 40 CFR Part 116 is discharged from any vessel or onshore or offshore facility in a quantity equal to or exceeding the reportable quantity determined by this Part, the owner, operator or person in charge will be liable, pursuant to sections 311 (f) and (g) of the Act, to the United States Government for the actual costs incurred in the removal of such substance, subject only to the defenses and monetary limitations enumerated in sections 311 (f) and (g) of the Act.

The Administrator may act to mitigate the damage to the public health or welfare caused by a discharge and the cost of such mitigation shall be considered a cost incurred under section 311(c) for the removal of that substance by the United States Government.

[FR Doc. 79-26758 Filed 8-28-79; 8:45 am]
BILLING CODE 6560-01-M

ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Part 122]

[FRL 1305-4]

Draft Application Forms for EPA Programs Regarding Naticnal Pollutant Discharge Elimination System Permits

AGENCY: Environmental Protection Agency.

ACTION: Request for additional comments on proposed application requirements for National Pollutant Discharge Elimination System permits and on proposed rules for regulating indicator parameters.

SUMMARY: Elsewhere in today's **Federal Register**, EPA has published final regulations concerning the control of spills and other discharges of substances designated as hazardous by the Administrator under section 311 of the Clean Water Act ("CWA"). Those regulations clarify that certain discharges of hazardous substances are to be regulated under the section 402 permit program (the National Pollutant Discharge Elimination System) rather than under section 311 of the Clean Water Act. As a result, the Agency will be required to amend its proposed application requirements (see proposed § 122.64(d), 44 FR 34393, June 14, 1979 and EPA's draft NPDES application form, 44 FR 34346, June 14, 1979) by requiring applicants for NPDES permits to submit information concerning the presence of hazardous substances in their discharges.

In addition, the Agency intends to expand its proposal of 40 CFR 125.3, proposed at 44 FR 34416 (June 14, 1979), that limitations on "indicators" (pollutants whose limitation will result in control of other pollutants) for pollutants listed as toxic under section 307(a) of CWA may be more stringent than the best conventional pollutant control technology ("BCT") and shall not be subject to section 301 (c) or (g) modifications. The proposal would be expanded to address the situation where a conventional pollutant is used as an indicator to control hazardous substances. Proposed § 125.3 would be expanded to provide that a limitation for a conventional pollutant which is used as an indicator for a hazardous substance not listed as a toxic pollutant may be set at a level more stringent than BCT.

The Agency is soliciting comments on these new proposed requirements.

DATES: Comments on the proposed application requirements and EPA's draft NPDES application form (44 FR 34346–34416, June 14, 1979) are due no later than September 12, 1979. The application requirements for hazardous substances proposed here are intimately tied to the requirements and the form. However, to afford the public an opportunity to comment upon the approach now being considered by the Agency, the deadline for all comments on application requirements for hazardous substances is extended to September 28, 1979.

The June 14, 1979 proposal and notice of the draft application form contains detailed discussion concerning the times and places of several public meetings which have already been or will be held throughout the United States to receive public comments (44 FR 34346 and 34393). They also contain information on the availability of pamphlets which summarize and explain the proposed requirements and draft form.

Comments should be addressed to: Edward A. Kramer (A–1), Permits Division (EN–336), Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, (202) 755–0750.

FOR FURTHER INFORMATION CONTACT: Dov Weitman, Permits Division (EN–336), Environmental Protection Agency, 401 M Steet SW., Washington, D.C. 20460, (202) 426–9441.

SUPPLEMENTARY INFORMATION: Section 311 of the Clean Water Act ("CWA") provides for the regulation of spills and other discharges of substances designated as hazardous by the Administrator of EPA. On November 2, 1978, the President signed certain amendments to section 311 of CWA. In response to those amendments, the Agency proposed certain amendments to its regulations governing hazardous substances on February 16, 1979 (44 FR 10266). Elsewhere in today's **Federal Register**, the Agency has published final regulations.

A major component of the 1978 Amendments to section 311 was the exclusion of certain discharges from coverage by section 311, because these discharges are more appropriately covered under the National Pollutant Discharge Elimination System ("NPDES") permit program established by section 402 of CWA. In its February 16, 1979 proposed section 311 regulations, the Agency would have required any facility seeking an exemption of particular hazardous substance discharges from section 311 coverage to identify such discharges when it applied for an NPDES permit and to either demonstrate adequate control of the discharge or obtain an NPDES permit condition controlling the discharge.

The Agency has reevaluated this proposal and concluded that continuous or anticipated intermittent discharges which are caused by events occurring within the scope of relevant operating or treatment systems are exempt from section 311 coverage whenever a permit application identifying the point source is submitted. This is consistent with the Congressional intent that such discharges would be more appropriately covered by the NPDES program and should be exempt from section 311 whenever an NPDES permit is applied for. A more detailed discussion of this subject is contained in the preamble to 40 CFR Part 117 (published elsewhere in today's **Federal Register**).

On June 14, 1979, the Agency proposed NPDES application requirements for existing industrial dischargers (44 FR 34393) and published a draft application form consistent with those requirements (44 FR 34346). The proposal reflected the proposed hazardous substance regulations of February 16, 1979. As mentioned above, under those requirements, an NPDES applicant's hazardous substance discharges would have been covered by section 311 unless the applicant identified the discharged hazardous substance in the NPDES application and sought NPDES coverage of those discharges. Therefore, the NPDES proposal of June 14 provided to the applicant an option of reporting any hazardous substance discharge for which section 311 exclusion is sought. See proposed 40 CFR 122.64(d)(19) and draft NPDES application form, 44 FR 34359–60 and 34415. However, the Agency saw no need to require such reporting where the applicant did not seek such an exclusion and was willing to have its hazardous substance discharges remain subject to the requirements of section 311.

Today's final promulgation of section 311 regulations requires a reevaluation of the proposed application requirements for hazardous substances. As noted above, the promulgated section 311 regulations now recognize the Congressional intent to exclude continuous or anticipated intermittent discharges which are caused by events occurring within the scope of relevant operating or treatment systems. To insure, as Congress intended, that such discharges remain subject to appropriate environmental controls, they must now be regulated in permits under the NPDES program. This in turn requires that such discharges be reported in NPDES applications.

The proposed June 14, 1979 application regulations would require all applicants from "Group I" industries to sample and analyze for and report

discharges of pollutants listed as toxic under section 307(a) of CWA in their process wastewater outfalls. These industries include the 34 industries identified in the Consent Decree in *Natural Resources Defense Council* v. *Train*, 8 ERC 2120 (D.D.C. 1976), amended on March 9, 1979, plus the Ferroalloys and Asbestos Manufacturing industries. The basis for this requirement is explained in detail at 44 FR 34394–34404. In addition, all "Group II" dischargers (those not listed in Group I) must report any known toxic pollutant discharges in all their outfalls, and Group I dischargers must report such discharges in their non-process wastewater outfalls. However, such reporting may be based upon estimates in lieu of sampling and analysis.

To properly regulate hazardous substances under the NPDES program, the Agency believes that it will be necessary to require applicants for NPDES permits to report hazardous substances discharges. However, the approach will differ, at least initially, from that used for toxic pollutants as described in the preceding paragraph. In formulating reporting requirements for hazardous substances, the Agency addressed two issues: Which hazardous substances should be reported, and in what manner should they be reported?

First, it should be noted that many hazardous substances are contained on the section 307(a) list of toxic pollutants; thus they are already required to be reported under the June 14 proposed application requirements for toxic pollutants. In addition, many of the dissociated ions of other hazardous substances already are required to be reported under the proposed requirements. For example, one hazardous substance, ammonium chromate, dissociates into the "nonconventional" pollutant ammonium ion and the toxic pollutant chromate ion. Ammonia and total chromium are already required by the June 14 proposal to be reported.

The Agency has therefore reviewed only those hazardous substances which would not be reported under the June 14 proposed requirements to determine which substances should now be added to the list of reportable pollutants. This determination is based in turn on an estimation of the significance of these substances as related to the considerations underlying the NPDES program. These considerations differ from those which were used to designate substances as hazardous. Thus, certain hazardous pollutants need not be reported in the NPDES applications.

For example, acetyl chloride in a highly concentrated form is harmful to aquatic life; in the context of a spill, which section 311 is intended to address, acetylchloride can cause harm due to shock effect. However, acetyl chloride is rapidly converted in water to acetate ion and chloride ion, which are much less harmful. In the context of discharges through outfalls, then, acetyl chloride does not pose a significant threat to aquatic life. Therefore, neither the compound nor its ions would be required to be reported in NPDES applications.

Other exclusions follow the logic of the June 14 proposed requirements which delete from present reporting requirements certain pollutants "such as chloride, calcium, potassium and sodium, because they are relatively non-toxic and the levels and amounts found in industrial discharges are generally not of concern," 44 FR 34400. A number hazardous substances and dissociated ions are not required to be reported for the same reasons.

Tables I and II list the hazardous substances and dissociated ions (other than those which are toxic pollutants and thus already covered by the June 14 proposed application requirements) which the Agency presently proposes to add to the list of reported pollutants. The Agency requests comments on these proposed reporting requirements, including data on the toxicity of hazardous substances or ions, stability in water, or any other factors which might indicate whether particular substances should be reported.

The manner in which hazardous substances listed in Tables I and II would be reported is presently limited by the lack of promulgated test methods for many of these substances. Due to the priority which the Agency has set on developing test methods for toxic pollutants, the Agency has not promulgated test methods (under Section 304(h) of CWA) for many of the hazardous substances or their ions. Therefore, apart from the testing requirements proposed on June 14, Group I applicants would be required under today's expanded approach to test their process wastewater outfalls only for the 16 hazardous substances (including 13 pesticides, 2 chlorinated hydrocarbons and 1 metal) for which test methods have been promulgated. (These pesticides are starred in Tables I and II.) As more test methods are developed in the future, the testing requirements would be expanded accordingly.

Table I—Hazardous Substances To Be Reported

Acetaldehyde
Allyl Alcohol
Allyl Chloride
Amyl acetate
Analine
Benzonitrile
*Benzyl chloride
Butyl acetate
Butylamine
*Captan
*Carbaryl
Carbofuran
Carbon disulfide
Chlorpyrifos
Coumaphos
Cresol
Crotonaldehyde
Cyclohexane
*2,4-D (Total)
*Diazinon
*Dicamba
Dichlobenil
Dichlone
2,2-dichloropropionic acid
Dichlorvos
Diethyl amine
Dimethyl amine
Dinitrobenzene
Diquat
*Disulfoton
*Diuron
*Epichlorohydrin
*Ethion
Ethylene diamine
Ethylene dibromide
Formaldehyde
Furfural
Guthion
Isoprene
Kelthane
Kepone
*Malathion
Mercaptodimetur
Methoxychlor
Methyl mercaptan
Methyl methacrylate
*Methyl parathion
Mevinphos
*Mexacarbate
Monethyl amine
Monomethyl amine
Naled
Napthenic acid
Nitrotoluene
*Parathion
Phosgene
Propargite
Propylene oxide
Pyrethrins
Quinoline
Resorcinol
Strychnine
Styrene
*2,4,5-T (Total)
2,4,5-TP (Total)
TDE
Trichlorofon
Triethylamine
Trimethylamine
Vinyl acetate
Vinylidene Chloride

*Test method has been promulgated under section 304(h).

Xylene
Xylenol

Table II—Dissociation Products of Hazardous Substances to be Reported

Isopropanolamine[1]
Strontium
Ethanolamine [2]
Uranium
*Vanadium
Phenolsulfanate [3]
Zirconium

Even in the case of the 16 substances for which test methods have been promulgated, the testing requirements for Group I industries would be more limited than in the case of toxic pollutants. This is based on two considerations. First, most Group I industries are not likely to have most of these substances in their discharges. For example, most Group I industries do not discharge any pesticides. Second, the promulgated test methods for the 15 organic substances use gas chromatography (GC), rather than GC/mass spectrometry (GC/MS). The use of GC/MS would allow analysis for all these organics at little incremental cost over the analysis for toxic pollutants. In contrast, the use of GC could result in incremental analytic costs of $2,000, because samples might have to be run on two or more GC colums to provide complete identification.

The Agency has tentatively concluded that until GC/MS methods are promulgated for the 15 organic hazardous substances, Group I applicants should be required to test for only those substances which they know or have reason to believe may be present in their discharges. Where an applicant believes that it does not discharge a measurable quantity of one of these 15 substances, it may so state in its application without testing for the pollutant. However, where an applicant knows or has reason to believe that a substance is present, it must test for the substance and report the measured level. Of course, the application-based limit of proposed 40 CFR 122.68(a) (discussed at 44 FR 34404) remains applicable in either case.

Unlike in the case of the 15 organic hazardous substances, incremental testing costs for vanadium are small, since its sampling and analysis may be conducted together with that for metals on the toxic pollutant list, which are already required to be tested. Therefore, all Group I applicants would be required to test for vanadium in their process wastewater outfalls.

In the case of the other hazardous substances in Tables I and II for which official test methods do not exist, the Agency intends to require Group I dischargers simply to indicate the presence or absence of hazardous substances in their discharges. If present, they would be required to indicate briefly (several words) the source of the discharge. Due to the lack of promulgated test methods for these substances, the Agency believes that this approach is reasonable. Of course, when the Agency promulgates test methods for these substances, the testing requirements would be expanded accordingly.

In the cases of discharges by Group II industries or non-process wastewater discharges by Group I industries, the Agency will require applicants to indicate only the presence or absence of hazardous substance discharges (whether or not test methods have been promulgated for those substances) and, if present, to indicate the source of discharge.

Where applicants are required to report only presence or absence, the application-based limits (proposed on June 14, 1979 in 40 CFR 122.68(a)) would not apply. However, where an applicant reports that it does not discharge a hazardous substance, and later learns or has reason to believe that it is discharging the substance, it would be required to report this fact to the permitting authority. If necessary, the permit would then modified to reflect the changed circumstances.

Upon receipt of an NPDES application, the Agency will use the information on hazardous sustance discharges, together with treatability information which the Agency is now assembling, to set appropriate permit limits to control the discharges. The method of using such information to set permit limits is fully discussed (with a particular emphasis on toxic pollutants, but equally applicable to hazardous substances) at 44 FR 34396–99, June 14, 1979.

As explained in the June 14 preamble, the basic approach to setting technology-based permit limits under section 301(b)(2) of CWA is to apply promulgated effluent limitations guidelines when they are available and, when they are not available, to set permit limits on a case-by-case basis under section 402(a)(1) of the CWA. See 40 CFR 125.3 (44 FR 32448, June 7, 1979). In either case, the goal is to establish a set of permit limits which will reflect the discharger's installation, operation and maintenance of treatment technology which provides the level of treatment required by the relevant subsections of section 301(b) of CWA.

Unlike in the case of toxic pollutants, which have been the prime focus of the Agency's new application requirements and permitting strategy, most hazardous substances will generally not be covered by effluent guidelines to be promulgated over the next several years. As explained in the June 14 preamble, resource constraints have required the Agency to focus both its guidelines and test method development activities upon toxic pollutants.

However, the absence of guidelines covering hazardous substances does not preclude control of these substances through permits. The Agency is gathering treatability information relating to the substances, which will afford to permit writers the opportunity to set limits for them. Furthermore, the Agency anticipates that the organic hazardous substances which are not on the toxics list, as well as certain ions of other hazardous substances which may be found in waste streams, will in the majority of cases be adequately controlled by the equipment which is installed to control the toxic pollutants in a discharge. (For example, most of the organic hazardous substances will be susceptible to biological treatment.) Therefore, the burden of setting case-by-case limitations on hazardous substances is greatly mitigated.

In those instances where the treatability information indicates that a hazardous substance present in the discharge at significant levels will not be adequately controlled (i.e., to BAT or other applicable standards) by the limitation of the toxic pollutants, permit limits must be set for the hazardous substances. As explained in detail at 44 FR 34397–9, the substances may be limited either directly or indirectly through the limitation of "indicator" parameters, whose limitation will insure installation and operation of equipment or methods which will control the hazardous substances.

Where a pollutant is used as an indicator to control toxic pollutants, proposed 40 CFR 125.3(g) has clarified that the limitation on that pollutant must reflect the best available technology economically achievable ("BAT") for the toxic pollutant discharge. Thus a conventional pollutant indicator limit for toxics would not be subject to the cost test for best conventional pollutant control technology ("BCT") under section 304(b)(4)(B) of CWA. This reasoning applies equally where a conventional pollutant is used as an indicator for hazardous substances, which are all subject to BAT (since they

*Test method has been promulgated under section 304(h).
[1] From isopropanolamine dodecylbenzenesulfonate.
[2] From Triethanolamine dodecylbenzenesulfonate.
[3] From zinc phenolsulfonate.

are all toxic or nonconventional pollutants). Thus the Agency intends to expand § 125.3 by similarly providing that a limit placed upon a conventional pollutant indicator for hazardous substances is not subject to the BCT cost test.

Since economic or water quality related variances are available for nonconventional (not listed as toxic or conventional) pollutants under sections 301(c) and 301(g) of CWA, such variances may be applied for whenever a conventional or nonconventional indicator is used to control a hazardous substance, unless the hazardous substance is a toxic pollutant. Of course, if the indicator is a conventional pollutant, no variance may result in a limitation which is less stringent than BCT for the conventional pollutant.

The Agency seeks comments upon the approach outlined above.

Economic Impact of Reporting Requirements

The Agency has considered the costs which will result from the proposed reporting requirements for hazardous substances. The reporting which does not require testing (determining the presence and source of the 64 hazardous substances which do not have promulgated test methods) would require no more resources than the reporting requirements originally proposed. (See 44 FR 34410.) The testing required for the 16 hazardous pollutants with promulgated test methods would have a small impact, except on those industries (such as the pesticides category) which are likely to have a number of hazardous substances present. The new requirement that all Group I industries test for vanadium, at an average cost of $20 per sample, adds about 0.4% to the total cost of testing for Group I applicants.

As noted above, the test methods for 15 of the 16 hazardous substances use GC. The Agency has previously estimated this cost to be $50–$100 per pollutant. The cost of GC for the 15 hazardous pollutants is likely to be at the high end of this range, because in some cases more than one GC column will have to be run to provide complete identification of the pollutant. (GC/MS methods, which generally provide conclusive identification, have not yet been promulgated for these 15 pollutants.) The Agency is assuming that no costs are added from sampling for the hazardous pollutants, because the sample (72-hour composite) can be collected at the same time as the one for toxic pollutants. Thus the total incremental testing cost is about $100 per hazardous substance. The Agency does not have sufficient information on the expected presence of these pollutants to make an estimate of the number of applicants who will be required to do this testing and the number of pollutants for which they will test. The thirteen reportable hazardous substances which are pesticides are unlikely to be present in effluents except in certain industry categories such as pesticides manufacturing. Thus it is likely, therefore, that most applicants will not test for any of the 13 pesticides; and so they will not incur additional costs for these analyses. A few applicants may be required to test for many of these substances and expend up to a possible maximum of $1300 per outfall. The Agency solicits information on the expected presence of the hazardous substances in effluents, and on the costs of their analytical methods.

Treatment Costs For Hazardous Substances

As described above, permit writers will in some circumstances set limits on a case-by-case basis on hazardous substances which will require the installation of additional treatment equipment. The Agency anticipates that such installation will not be necessary in most cases, because many dischargers do not discharge hazardous substances in significant quantities and because in most cases the BAT-level treatment required to treat toxic and nonconventional pollutants will also remove hazardous substances.

In most cases applicants with discharges of hazardous substances will have installed or be required to install treatment systems to control toxic and other pollutants. If additional treatment is required, one type of treatment which is likely to be added to control hazardous substances (when they are present in a discharge) is carbon adsorption, which removes many organic compounds which are not hydrolyzed or precipitated by other treatment systems such as biological treatment. Thus, where an applicant discharges hazardous substances but has not installed carbon adsorption equipment to control other pollutants, incremental treatment cost may be involved with respect to the hazardous substances.

Table III summarizes the capital and annual costs of adding a carbon adsorption unit for various sizes of plants. The table is based upon information contained in EPA's Development Document for Final BPT Effluent Limations Guidelines for the Pesticide Chemicals Manufacturing Point Source Category, April, 1978 (EPA 440/1-78/060-e).

TABLE III—Capital and Annual Costs for Carbon Treatment System—750 Minutes Detention Time

	Large plant	Medium plant	Small plant
Flow, mgd	0.3	0.067	0.015
Capital Cost	$6,219,250	$1,820,190	$791,150
Annual Cost (including capital recovery)	2,442,560	770,540	336,880

Applicants who are most likely to have one or more of the hazardous substances in their effluents are those in the pesticides manufacturing and formulating categories. These applicants will be required to install BAT-level treatment by the Effluent Limitations Guidelines, which cover a large number of pesticides, including the 13 reportable hazardous pesticides. The costs of installing treatment for permittees covered by effluent guidelines is considered in developing the guidelines. Therefore, even in the pesticides industry, the reporting requirements for the hazardous substances will generally not lead to increased treatment requirements. The Agency requests any information on the number of permittees which might be required to install additional treatment, and on the costs of such treatment systems.

Dated: August 15, 1979.

Marvin B. Durning,

Assistant Administrator for Enforcement, United States Environmental Protection Agency.

[FR Doc. 79-26760 Filed 8-28-79; 8:45 am]

BILLING CODE 6560-01-M

[40 CFR Parts 116, 117]

[FRL 1305-5]

Proposed Removal of Calcium Oxide and Calcium Hydroxide From Hazardous Substance List

AGENCY: Envrionmental Protection Agency.

ACTION: Proposed amendment to rule.

SUMMARY: On March 13, 1978, (43 FR 10474) EPA listed calcium oxide and calcium hydroxide ("lime") as hazardous substances under section 311 of the Clean Water Act. In response to a petition, EPA has tentatively concluded that these compounds are not hazardous within the meaning of section 311. EPA is therefore proposing to remove these chemicals from its hazardous substance list.

DATES: Public comments on this proposed action must be submitted on or before September 28, 1979.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth M. Mackenthun, Director, Criteria and Standards Division (WH-

585), Office of Water Planning and Standards, Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460. (202–755–0100).

SUPPLEMENTARY INFORMATION: Section 311(b)(2)(A) of the Clean Water Act (the Act) requires the Administrator to promulgate regulations designating as hazardous substances those elements and compounds which, when discharged in any quantity to surface waters or adjoining shorelines, present an imminent and substantial danger to the public health or welfare. Section 311(b)(4) of the Act requires the Administrator to assign to each designated hazardous substance a quantity which, if discharged, gives rise to reporting requirements and civil penalty and clean-up cost liability.

Pursuant to this authority, on March 13, 1978, EPA promulgated regulations designating 271 substances as hazardous. 43 FR 10474. EPA designated substances as hazardous on the basis of their acute toxicity to acquatic organisms. See discussion at 43 FR 10474–79. Calcium oxide and calcium hydroxide ("lime") were among the substances designated. Because laboratory tests indicate that both compounds are acutely toxic in concentrations greater than 100 mg/l and less than 500 mg/l, EPA placed them in Category D, the least toxic category, and assigned them "harmful quantities" of 5,000 pounds. See 43 FR 10489–94.

On February 16, 1979, the designation regulations were amended, and lime was retained as a hazardous substance. 44 FR 10266, 40 CFR Part 116. At the same time, the former harmful quantity regulations were revoked (44 FR 10269) and replaced by proposed determinations of reportable quantities. 44 FR 10271, 40 CFR Part 117. These regulations are published in final form elsewhere in today's **Federal Register.**

On April 3, 1979, the Mississippi Lime Company (MLC) petitioned EPA for reconsideration of the regulation designating lime as a hazardous substance. The petition contends that lime does not present an "imminent and substantial" danger to the environment for two reasons: (1) Because of the beneficial uses of lime and because of the alleged absence of conclusive historical evidence that lime discharges have in the past resulted in environmental damage ("Ground One"); and (2) because the unique chemistry of lime and its reaction with water precludes the acutely toxic effects relied on by EPA for designation ("Ground Two"). Ground One lacks merit, but EPA has tentatively concluded that Ground Two is good cause for removing lime from the list of designated hazardous substances.

Ground One

The Act does not limit the list of hazardous substances to those which have already conclusively demonstrated their danger by virtue of a catastrophic discharge. The statutory standard of "imminent and substantial danger" is precautionary and preventative in nature. The statute contemplates designation of substances based on their hazardous properties, and makes no mention of consideration of past environmental damage.

Congress sought through section 311 to avoid environmental insult before it occurred. Moreover, since there has been no requirement that discharges of hazardous substances be reported, the lack of a discharge history is no basis for concluding that a substance has not in fact been discharged and resulted in "imminent and substantial danger" to the environment.

Similarily, the fact that lime is an important commerical chemical which has a number of benficial uses does not preclude its listing as a hazardous substance. All chemical produced commerically, including those designated as hazardous substances, are apparently meeting a market demand and must therefore be assumed to have beneficial uses. Designation under section 311 does not prohibit the manufacture, transport or use of a substance, but rather restricts the discharge of the substance. Accordingly, past discharge history and beneficial uses of a substance are not relevant to designation of that substance as hazardous.

Ground Two

The issues concerning the chemistry of the reaction of lime and water are more persuasive. Information submitted by MLC indicates that the amount of lime that is available for solution in water in case of a spill (i.e., the amount which can contribute to potential fish toxicity) is only a small percentage of the total amount spilled. The principal reason for this phenomenon is that lime is a dry bulk solid that undergoes rapid hydration upon exposure to moisture or water forming a gel-like cover which protects most of the lime from reaction with water. The hydrated or "slaked" lime in the gel-like cover reacts quickly with available carbonate ions to form a relatively insoluble calcium carbonate covering.

MLC also presented information that the small amount of lime which does go into solution reacts quickly with carbonate ions (or bicarbonates) in the water to form calcium carbonate (limestone), which is toxic to fish only at concentrations much greater than 500 mg/l.

Therefore, upon consideration of the evidence submitted, EPA proposes to delete calcuim hydroxide and calcium oxide from 40 CFR Parts 116 and 117, because EPA has tentatively concluded that these substances do not present an imminent and substantial danger to the environment when discharged.

It should be emphasized that this proposed determination does not affect the validity of EPA's acute aquatic toxicity criterion. Rather, based on the documents provided by petitioner MLC, it appears that the unique chemistry of lime is such that lime would not exceed the section 311 acute toxicity criterion when discharged in the environment.

Comments

This proposed action affects the designation of only two of the 299 hazardous substances. Because the issues concerning designation have been fully ventilated in previous comment periods, the Agency has determined that a comment period of thirty (30) days will be sufficient to address the issues raised in this proposed action.

Date: August 20, 1979.

Douglas M. Costle,

Administrator.

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES

Part 116 is amended as follows:

1. Delete from § 116.4, Table 116.4A, the term Calcium hydroxide, CAS No. 1305620, Lime, hydrated, slaked lime, Calcium hydrate.

2. Delete from § 116.4, Table 116.4A, the term Calcium hydroxide, CAS No. 1305788, Lime, quicklime.

3. Delete from § 116.4, Table 116.4B, CAS No. 1305620, Calcium hydroxide.

4. Delete from § 116.4, Table 116.4B, CAS No. 1305788, Calcium oxide.

PART 117—DETERMINATION OF REPORTABLE QUANTITIES

Part 117 is amended as follows:

1. Delete from § 117.3, Table 117.3, the term Calcium hydroxide, Category D. RQ in pounds (kilograms), 5,000 (2270).

2. Delete from § 117.3, Table 117.3, the term Calcium oxide Category D, RQ in pounds (kilograms), 5,000 (2270).

[FR Doc. 79–26757 Filed 8–28–79; 8:45 am]

BILLING CODE 6450–01–M

ENVIRONMENTAL PROTECTION AGENCY

DEPARTMENT OF TRANSPORTATION

Coast Guard

[FRL 1305-3]

Memorandum of Understanding Between the Environmental Protection Agency and the U.S. Coast Guard Concerning the Assessment of Civil Penalties for Discharges of Oil and Designated Hazardous Substances

The United States Environmental Protection Agency (EPA) and the United States Coast Guard (USCG) have determined that it is necessary to establish procedures pursuant to which decisions may be made:

(1) Whether a discharge of a designated hazardous substance is excluded from the application of the civil penalty procedures prescribed by section 311(b)(6) of the Clean Water Act (CWA); and

(2) Whether action will be taken under paragraph (A) or under paragraph (B) of section 311(b)(6) CWA to impose a penalty for the discharge of a designated hazardous substance not so excluded.

The EPA and the USCG agree that decisions as to whether a discharge of a designated hazardous substance is excluded from the application of section 311(b)(6) CWA will be made initially by the EPA in cases evidencing particular potential violation gravity, *i.e.*, meeting criteria set out in section III of this memorandum. In all other cases the decision will be made initially by the agency providing the On Scene Coordinator to the discharge incident. When a decision is made that a discharge is excluded, penalty action under section 311(b)(6) CWA will be withheld.

The EPA and the USCG agree that decisions as to whether action will be initiated to impose civil penalties under paragraph (B) of section 311(b)(6) CWA, will be made by the EPA. Cases involving USCG responses, which evidence particular potential violation gravity, *i.e.*, meeting criteria set out in section III of this memorandum, will be transmitted to the EPA for its consideration. In all cases where EPA determines that it is appropriate to initiate civil penalty action under paragraph (B) of section 311(b)(6) CWA, the USCG will withhold the initiation of civil penalty action under paragraph (A) of section 311(b)(6) CWA.

This memorandum establishes policies, procedures, and guidelines concerning the responsibilities of the EPA and the USCG in carrying out the foregoing agreement.

The respective responsibilities of each agency specified in this memorandum may be delegated to their respective subordinates consistent with established procedures.

The EPA and the USCG will review the implementation of this memorandum at least one year from the effective date of 40 CFR Part 117 or sooner if agreed to by both agencies, and will make any changes to the policy, procedures, and guidelines set forth herein which are agreed to by both agencies.

Section 1—General

The amendment of 2 November 1978 to section 311 CWA (Pub. L. 95–576) excluded certain discharges of hazardous substances from the application of section 311(b)(6) CWA. The discharges so excluded are: (a) discharges in compliance with a section 402 CWA permit, (b) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 CWA, and subject to a condition in such permit, and (c) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 CWA, which are caused by events occurring within the scope of relevant operating or treatment systems.

In addition, this amendment created two methods for penalizing discharges of hazardous substances. The first, which already existed as section 311(b)(6) CWA prior to the amendment, authorizes the USCG to assess a civil penalty not to exceed $5,000 for the discharge of oil or a designated hazardous substance (section 311(b)(6)(A)). The second method, created by the new amendment, provides that the EPA, through the Department of Justice, may initiate a civil action in Federal district court for penalties not to exceed $50,000 per spill of hazardous substance, unless such discharge is the result of willful negligence or willful misconduct, in which case the penalty shall not exceed $250,000 (section 311(b)(6)(B)).

The legislative history accompanying the amendment makes clear that Congress intended to create a dual option system for penalizing discharges of hazardous substances under section 311(b)(6) CWA. A discharger of a designated hazardous substance can be penalized under paragraph (A) or paragraph (B), but not both. The EPA and the USCG agree that paragraph (B) does not apply to oil discharges. The USCG will continue to assess oil discharge penalties administratively under paragraph (A).

Section II—Coordination

When a spill of a designated hazardous substance occurs, the On Scene Coordinator (OSC) will prepare a factual report of the incident. At the minimum, the report will address those criteria set forth in section III, of this memorandum.

The OSC will submit this report within 60 days of the spill incident. The OSC will submit the report to the District Commander when he is a USCG OSC, and to the Regional Administrator, when he is an EPA OSC.

When the District Commander reviews the USCG OCS's report and determines that one or more of the criteria set forth in section III, below is applicable to that case, the entire record of that case will be referred to the EPA Regional Administrator for review. In addition the District Commander will refer the entire record of:

(a) Any other case involving a discharge of a designated hazardous substance from a point source subject to a section 402 permit or permit application, which, prior to or after the commencement of penalty action, the USCG determines is excluded from the application of section 311(b)(6) CWA; and

(b) Any other case which, the District Commander considers appropriate for possible application of section 311(b)(6)(B) CWA.

When the Regional Administrator receives a case, either from an EPA OSC or upon referral from the District Commander, he will determine:

(a) Whether the case is excluded from the application of section 311(b)(6) CWA, and, if not,

(b) Whether a civil penalty action under section 311(b)(6)(B) CWA will be initiated.

The Regional Administrator will make these determinations within 90 days of his receipt of referral documents and will notifty the District Commander promptly of the determinations in cases which have been referred. If the Regional Administrator determines that an action under section 311(b)(6)(B) CWA will be initiated, the case will be prepared in the EPA Regional Office and forwarded to the Department of Justice (DOJ) in accordance with established EPA case referral procedures.

If the Regional Administrator determines that the discharge is not excluded from the application of section

311(b)(6) CWA and that paragraph (B) action is inappropriate, or if EPA Headquarters declines to refer a Regional case, EPA will return the case to the USCG for appropriate action under paragraph (A).

Upon request, each Agency will make available to the other any or all cases, files, and records, including OSC reports and official determinations, regarding decisions concerning exclusions or the imposition of section 311(b)(6)(A) or (B) penalties. Where there is disagreement as to the disposition of a particular case, the District Commander and the Regional Administrator will consult to resolve the matter. If necessary, the matter will submitted to the respective Agency Headquarters for final resolution.

Secion III—Criteria

The USCG and the EPA agree that if one or more of the following criteria exists, the District Commander will refer the case to the Regional Administrator in accordance with section II of this memorandum:

a. Any indication of misconduct or lack of reasonable care on the part of the owner, operator, or person in charge with respect to the discharge or with respect to the failure on the part of the owner, operator, or person in charge to adhere to the guidance of the OSC regarding clean-up or any policies, procedures, guidelines, or regulations applicable to clean-up;

b. Any discharge incident other than a threat for which payments are made or to be made from the section 311(k) fund pursuant to 33 CFR 153.407, except where no discharge has been identified;

c. Any indication of prior violations by the discharger of any provision of the CWA, or violations of provisions of the CWA other then section 311(b)(6) CWA occurring at the time of the discharge, such as violations of a section 402 permit;

d. Any discharge incident (other than a threat) as defined in 40 CFR 1510.5 (l) which requires activation (by full or limited assembly, or by telephone) of the Regional Response Team as required by 40 CFR 1510.34(d), as amened; and

e. Any discharge involving human injury or evacuation, damage to plant or animal life, or contamination of water supply or underground aquifers.

Other referrals to the EPA may be made on a discretionary basis.

Dated: August 15, 1979.

Marvin B. Durning,

Assistant Administrator for Enforcement, United States Environmental Protection Agency.

Dated: August 17, 1979.

R. H. Searborough,

Acting Commandant, United States Coast Guard.

[FR Doc. 79-26759 Filed 8-28-79; 8:45 am]

BILLING CODE 6560-01-M